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1979

Utah State University of Agriculture and Applied Science, A Utah Body Politic and Corporate v. Bear Stearns & Co., A Corporation v. Phillif A. Bullen, Jay R. Bingham, O. C. Hammond, Jay Dee Harris, Beverly D. Kumpfer, Snell Olsen, Rex G. Plowman, W. B. Robins, Alva C. Snow, William R. Stockdal Jane S. Tibbals, Glen L. Taggart, Dee A. Broadbent, L. Mark Neuberger, Donald A. Catron, John Does, the Institutional Council of Utah State University of Agriculture and Applied Science : Brief of Appellants Bear Steads &, Sutro & . Co. , Incorporated, Hornblower If Weeks-Hemphill,

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# Noyes, Inc. and Merrill Lynch, Pierce, Fenner & Smith, Inc.

Utah Supreme Court

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Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors. Robert S. Campbell, Michael Heyrund, Lyle W. Hillyard, David R. Melton; Attorneys for certain Third-Party Defendants Darwin C. Hansen; Attorney for Third-Party Defendant Catron David L. Wilkinson; Attorney for Plaintiff Daniele M. Allred, Kathlene W. Lowe; Attorneys for Appellants

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IN THE SUPREME COURT OF THE STATE OF UTAH

---

UTAH STATE UNIVERSITY OF :  
AGRICULTURE AND APPLIED SCIENCE, :  
a Utah body politic and corporate, :

Plaintiff & Respondent, :

-vs- :

BEAR STEARNS & CO., a corpora- :  
tion, :

DOCKET NO. 16274  
(Consolidated)

Defendant-Third Party :  
Plaintiff & Petitioner, :

-vs- :

PHILLIP A. BULLEN, JAY R. BINGHAM, :  
O. C. HAMMOND, JAY DEE HARRIS, :  
BEVERLY D. KUMPFER, SNELL OLSEN, :  
REX G. PLOWMAN, W. B. ROBINS, :  
ALVA C. SNOW, WILLIAM R. STOCKDALE, :  
JANE S. TIBBALS, GLEN L. TAGGART, :  
DEE A. BROADBENT, L. MARK :  
NEUBERGER, DONALD A. CATRON, JOHN :  
DOES, THE INSTITUTIONAL COUNCIL :  
OF UTAH STATE UNIVERSITY OF AGRI- :  
CULTURE AND APPLIED SCIENCE, :

Third-Party Defendants. :

---

BRIEF OF APPELLANTS BEAR STEARNS & CO.,  
SUTRO & CO., INCORPORATED, HORNBLOWER &  
WEEKS-HEMPHILL, NOYES, INC. and MERRILL  
LYNCH, PIERCE, FENNER & SMITH, INC.

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IN THE SUPREME COURT OF THE STATE OF UTAH

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UTAH STATE UNIVERSITY OF :  
AGRICULTURE AND APPLIED SCIENCE, :  
a Utah body politic and corporate, :

Plaintiff & Respondent, :

-vs- :

BEAR STEARNS & CO., a corpora- :  
tion, :

Defendant-Third Party :  
Plaintiff & Petitioner, :

-vs- :

PHILLIP A. BULLEN, JAY R. BINGHAM, :  
O. C. HAMMOND, JAY DEE HARRIS, :  
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NEUBERGER, DONALD A. CATRON, JOHN :  
DOES, THE INSTITUTIONAL COUNCIL :  
OF UTAH STATE UNIVERSITY OF AGRI- :  
CULTURE AND APPLIED SCIENCE, :

Third-Party Defendants. :

---

UTAH STATE UNIVERSITY OF :  
AGRICULTURE AND APPLIED SCIENCE, :  
a Utah body politic and corporate, :

Plaintiff & Respondent, :

-vs- :

SUTRO & CO., INCORPORATED, :

Defendant-Third Party :  
Plaintiff & Petitioner, :

-vs- :

PHILLIP A. BULLEN, et al, :

Third-Party Defendants. :

BRIEF OF APPELLANTS  
BEAR STEARNS & CO.,  
SUTRO & CO., INCORPORATED,  
HORNBLLOWER & WEEKS-  
HEMPHILL, NOYES, INC.  
AND MERRILL LYNCH, PIERCE,  
FENNER & SMITH, INC.

Docket No. 16274  
(Consolidated)

UTAH STATE UNIVERSITY OF :  
AGRICULTURE AND APPLIED SCIENCE, :  
a Utah body politic and corporate, :

Plaintiff & Respondent, :

-vs- :

HORNBLOWER & WEEKS-HEMPHILL, :  
NOYES, INC., a corporation, :

Defendant-Third Party :  
Plaintiff & Petitioner, :

-vs- :

PHILLIP A. BULLEN, et al, :

Third-Party Defendants. :

---

UTAH STATE UNIVERSITY OF :  
AGRICULTURE AND APPLIED SCIENCE, :  
a Utah body politic and corporate, :

Plaintiff & Respondent, :

-vs- :

MERRILL LYNCH, PIERCE, FENNER & :  
SMITH, INC., a corporation, :

Defendant-Third Party :  
Plaintiff & Petitioner, :

-vs- :

PHILLIP A. BULLEN, et al, :

Third-Party Defendants. :

---

On Appeal From the First Judicial District Court  
In and For Cache County, Utah

The Honorable VeNoy Christofferson

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IN THE SUPREME COURT OF THE STATE OF UTAH

BRIEF OF APPELLANTS

STATEMENT OF THE NATURE OF THE CASE

In these related actions, appellee and plaintiff Utah State University of Agriculture and Applied Science (hereinafter "the University") seeks to recover from appellants and defendants third-party plaintiffs (hereinafter "the broker-dealers") various losses allegedly arising from an investment program which it conducted from September 1970 to March 1973, on the sole ground that its securities purchases were ultra vires. The broker-dealers filed third-party indemnity actions based on misrepresentation against members of the University's Institutional Council and others who represented on numerous occasions by official corporate resolution that the University did have the power that the University now contends it lacks.

DISPOSITION IN LOWER COURT

On January 3, 1979, the trial court entered orders in all these cases (1) granting the University's motions against all broker-dealers for partial summary judgment on the issue of liability, and (2) denying the broker-dealers' motions to dismiss the University's complaints for failure to state a claim upon which relief can be granted. At the same time it also entered final judgment dismissing all third-party actions and counterclaims instituted by the broker-dealers. All broker-dealers appealed from those final judgments and also filed petitions for intermediate appeal from the court's order granting the

University's motion for partial summary judgment and denying the broker-dealers' motions to dismiss for failure to state a claim.<sup>1/</sup>

All broker-dealers but Merrill Lynch, Pierce, Fenner & Smith, Inc. also filed motions to dismiss for lack of in personam jurisdiction and Merrill Lynch filed a motion for change of venue. These motions were denied.

#### RELIEF SOUGHT ON APPEAL

The broker-dealers seek reversal of the trial court's order granting the University's motions for partial summary judgment and denying their motions to dismiss for failure to state a claim and request that this Court remand the case with instructions to enter judgment in favor of the broker-dealers pursuant to their motions to dismiss. If this Court does not order dismissal of the University's complaints, the broker-dealers seek, in the alternative, reversal of the trial court's entry of partial summary judgment and an order from this Court remanding the case for trial. The broker-dealers also seek an order reversing the trial court's dismissal of the broker-dealers' counterclaims and third-party complaints. In the alternative to the dismissal of the University's complaints, the broker-dealers also seek reversal of the orders denying their motions to dismiss for lack of in personam jurisdiction and, in the Merrill Lynch action only, reversal of the order denying its motion for change of venue.

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1. Subsequently, this Court granted the brokers' petitions for intermediate appeal and consolidated the two sets of appeals.

## STATEMENT OF FACTS

### Introduction

A brief summary of the genesis and development of this litigation may assist the Court in understanding the posture of these cases before it proceeds to review the ensuing detailed discussion of the facts.

In 1970, University officers, at the direction of the University's Institutional Council, launched a new and aggressive investment program and began opening accounts with the defendant broker-dealers so that the University could buy and sell securities, including common stocks.<sup>2/</sup> The program was "aggressive" in the sense that it was not restricted to the classes of securities historically purchased by institutional investors.<sup>3/</sup> All those accounts were opened pursuant to official corporate resolutions adopted by the Institutional Council which represented to the broker-dealers that the University had power to purchase the securities at issue.<sup>4/</sup>

Once the broker-dealers had received those express warranties from the Council, they carried out the hundreds of orders for pur-

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2. Exhibit 49 to all depositions; Robins depo. at 18-19. Each exhibit identified herein is part of one set of exhibits utilized in all these depositions.

3. September 19, 1970 Institutional Council resolution addressed to Merrill Lynch, Pierce, Fenner & Smith, Inc., Exs. 7, 8 and 9.

4. Copy of resolution of January 20, 1972 is attached hereto as Appendix B. Institutional Council adoption of first resolution to Merrill Lynch on September 19, 1970, Exhibits 8 and 9 to depositions; Council adoption of resolutions on January 16, 1971 and April 24, 1971 to broker-dealers not parties to these appeals, Exs. 16, 86 (minutes of January 16, 1971 meeting), 38; Council adoption of resolution on January 20, 1972 sent to all broker-dealers, Exs. 86 (minutes of January 20, 1972 meeting) and 33; Council adoption of second specific resolution addressed to Merrill Lynch on September 30, 1972, Ex. 46. Receipt of resolutions by broker-dealers: Merrill Lynch, R. 1437-39; Bear Stearns, R. 2003; Sutro, R. 125-26; Hornblower, R. Vol. 22, 1975. In all instances in which similar documents appear in all files, citations herein will be to the Bear Stearns file only.

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chases and sales of common stock placed by Mr. Catron, the University's investment officer. In almost all of those instances the broker-dealers acted only as agents for the University and its purchasers or sellers, and only on a few occasions did any of them make recommendations that the University purchase any particular stock.<sup>5/</sup>

The University heirarchy never once advised the broker-dealers during this time that it might possibly lack power to make the investments which it regularly ordered them to make on its behalf, even though it had ready access to the legal staff of the Utah Attorney General's office. After all of the transactions here at issue had been fully executed, a general economic recession occurred and the University's portfolio declined in value.

The University then instituted suit in federal court against all these broker-dealers, suing on various provisions of the federal securities laws and also raising claims essentially identical to those claims presently before this Court on these state court actions.<sup>6/</sup> Judge Anderson of the United States District Court for the District of

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5. Defendant Hornblower acted only as an agent for the University in all of these transactions. Affidavit of Peter A. Nalewaik of July 21, 1976, Hornblower, R. 73. Defendant Sutro acted only as an agent for the University in every transaction but one. It acted as a principal in the University's transactions for Hanover Square debentures, but that single transaction comprises an insignificant part of the University's claim against it. Supplemental Affidavit of Felix M. Juda, Sutro, R. 1973. Defendant Bear Stearns acted primarily as an agent for the University, and acted as principal only in those transactions listed in the Affidavit of David Cranston, dated July 28, 1977, Bear Stearns, R. 1998.

6. The University's subsequent appeal to the United States Court of Appeals for the Tenth Circuit is a reported decision of which this Court may take judicial notice. Utah State Univ. of Agriculture and Applied Science v. Bear, Stearns & Co., 549 F.2d 164 (10th Cir. 1977). A cursory review of the first few pages of that decision, in which the appeals court discussed the nature of the University's claims, demonstrates the similarity of its claims in federal court to its claims in state court. The appellate court also expressly noted the fact that the University there alleged pendant claims under state law. Id. at 166.

Utah granted the broker-dealers' motions to dismiss and motions for summary judgment in those actions, all of which were based upon the broker-dealers' assertion that the University failed to state a claim upon which relief could be granted,<sup>7/</sup> and the University then unsuccessfully appealed that ruling to the United States Court of Appeals for the Tenth Circuit and sought certiorari to the United States Supreme Court, which was denied.<sup>8/</sup>

The Tenth Circuit's decision was a unanimous ruling that the University's theory of recovery, including its theory of selective rescission, was untenable. One passage in that decision is a cogent summary of the broker-dealers' position on the present appeals:<sup>9/</sup>

The argument that the brokers are liable because they should have known that the stock purchases by USU were illegal under Utah law does not impress us. USU seeks to take advantage of its own wrongful acts. It would retain the profits which it has made and recover from the brokers the losses which it has sustained. An ultra vires act of an institutional customer may not be converted into a wrongful act of a broker.

At that point, the University then instituted suit in state court, raising in that forum the common law claims which it had unsuccessfully raised as pendent causes of action in its federal suits.

It should be noted at this point that the broker-dealers are not appealing herein from the trial court's dismissal of their third-party actions against the Institutional Council as an entity, but are appealing only those third-party judgments entered in favor of the indivi-

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7. The brokers' motions to dismiss, and the motion of Merrill Lynch for judgment on the pleadings rather than to dismiss, are discussed in the Tenth Circuit's opinion in Utah State University, supra, id. at 171.

8. 434 U.S. 890 (1977).

9. 549 F.2d at 168 **emphasis added**.

duals who were on the Council or were University officers. Nor do the broker-dealers appeal herein from judgments entered in favor of the two banks whom they had sued on third-party actions below. To summarize, these appeals are concerned only with the following rulings:

1. The trial court's entry of partial summary judgment in favor of the University and its denial of the broker-dealers' motions to dismiss for failure to state a claim;

2. The court's dismissal of the broker-dealers' counterclaims;

3. The court's dismissal of the broker-dealers' third-party actions against Institutional Council members and University officers in their individual capacities; and

4. The court's denial of the broker-dealers' motions to dismiss for lack of personal jurisdiction and Merrill Lynch's motion for change of venue.

A. The University's Investment Program.

Not one of the facts presented here has been controverted by any party. All of these facts except those identified as deposition testimony or exhibits were presented to the trial court before it dismissed the broker-dealers' third party actions and counterclaims, and all these facts were presented to the court before it granted the University's motions for partial summary judgment.<sup>10/</sup>

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10. Many of the facts set forth herein were first presented to the court below at length in the brokers' joint memorandum in support of their motions to dismiss for failure to state a claim upon which relief can be granted, filed May 16, 1977. Bear Stearns, R. 553. Each of the ultimate facts asserted in opposition to the third party defendants' motions to dismiss and for summary judgment are pled in the brokers' third party complaints and summarized at 4-8 of the brokers' joint memorandum in opposition to those motions to dismiss, alternative motions for summary judgment, and the University's motion to dismiss the counterclaims, filed on November 3, 1977. Bear Stearns, R. 1151.

Finally, all the facts set forth herein were argued to the court below in the brokers' joint memorandum in opposition to the University's motions for partial summary judgment, filed May 16, 1978. Bear Stearns, R. 2005. The court below inadvertently omitted to file that memorandum with the Sutro pleadings, but it was aware that the identical memorandum was filed in all four cases, and the memorandum bears a designation for the Sutro case on its face.



1. Origin of the Investment Program and Policy.

In response to criticism from State officials of the University's practice of leaving idle cash balances in local banks,<sup>11/</sup> and in order to increase the University's financial resources, the Institutional Council formulated and launched the University's securities investment program in mid-1970. Virtually all of the hundreds of securities purchased by the University between mid-1970 and March 1973 (the period at issue) were of a kind not designated in Utah Code Ann. §33-1-1.

One of the first actions the Institutional Council took in embarking upon the investment program was to approve a formal corporate resolution on September 19, 1970, addressed to defendant Merrill Lynch. The resolution stated, inter alia, that the University was "authorized and empowered to open and maintain an account with Merrill Lynch . . . for the purchase and sale of stocks, bonds or securities . . .," that the University's Vice President of Business and Treasurer, Dee A. Broadbent, and its Controller, Donald A. Catron, were authorized to place orders for securities on the University's behalf, and that the resolution would remain in effect until revoked in writing.<sup>12/</sup>

On the same day, the Institutional Council commissioned President Taggart to form an investment committee for the purpose of formulating an investment policy.<sup>13/</sup> The investment committee was composed of

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11. In the summer of 1970 the Governor of Utah reduced the University's budget by two percent. Glen Taggart depo. at 33. In response to University President Taggart's inquiry as to how the University might make up this loss, the State Board of Higher Education advised the University by letter to invest its idle funds. Id. at 33-34. A few months prior to this, the Utah State Auditor had criticized the University for leaving idle large excess cash balances in local bank accounts. Ex. 4.

12. Exs. 7, 8, 9, Bear Stearns, R. 2003.

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13. Ex. 7.



three members of the Institutional Council<sup>14/</sup> and three members of the University administration.<sup>15/</sup>

In order to formulate such a policy, and after the University had already been engaged for several months in purchasing securities not mentioned in Utah Code Ann. §33-1-1, certain members of the Investment Committee<sup>16/</sup> and Catron and Broadbent attended an investment seminar in San Francisco sponsored by the Ford Foundation on the subject of securities investments by institutions of higher learning.<sup>17/</sup> They returned with a Ford Foundation report entitled Managing Educational Endowments,<sup>18/</sup> and Councilman Plowman gave an oral report on the seminar to the entire Council on February 23, 1971.<sup>19/</sup>

Three of the themes put forward by the Ford Foundation at the seminar, and in the publication prepared by it, influenced and became a part of the University's investment program. One theme was that in the past those who managed portfolios of educational institutions had lost, because of inflation, more money by being conservative in securities investments than by being aggressive, and that portfolio managers should move from fixed income securities to equity securities, i.e.

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14. Council Chairman Bullen and Councilmen Plowman and Stockdale. Ex. 10.

15. Vice President Dee Broadbent, Donald A. Catron, and Jerry Sherrat. Id.

16. Council Chairman Bullen and Councilman Plowman. Plowman depo. at 24; Ex. 17 at 6.

17. Id.

18. Stockdale depo. at 34-35; Ex. 96.

19. Ex. 17 at 6-7, Institutional Council meeting minutes of February 23, 1971.

to stocks.<sup>20/</sup>

The Ford Foundation report also recommended that institutions not be restricted to "conventional blue chips" in common stock investments.<sup>21/</sup> The report stated<sup>22/</sup> that the traditional reason for investing in blue chips

largely disappears when the primary emphasis is shifted from avoiding losses to maximizing the long-term return. . . . With a rapid advance in technology and the resulting growth of major new industries, many of the smaller and newer companies are growing far more rapidly than the big ones, and their stocks can offer rewards sufficiently large to completely outweigh any additional risks.

A third theme of the Ford Foundation report was that decisions to purchase or sell particular securities should be delegated to a single manager with regular review by the institution's trustees.<sup>23/</sup>

The University incorporated all these principles into its investment program. It subsequently invested in numerous common stocks, some of which could not be called "blue chips," and delegated the day-to-day decisions to buy and sell to a single individual, Mr. Catron. The identity, costs, sales prices, and current value of all the securities purchased by the University were all reported to the Investment

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20. Ex. 96.

21. Ex. 96 at 16.

22. Id. at 31-32.

23. Id. at 31.

Committee and the Institutional Council on a regular and periodic basis.<sup>24/</sup>

2. The Council Authorizes A Margin Account.

In January 1972 the Council approved a new "broader" corporate resolution, a copy of which is attached hereto as Appendix B, which represented that the University had power to purchase "securities of every nature on margin or otherwise," and which again authorized Broadbent and Catron to purchase and sell securities on the University's behalf.<sup>25/</sup> A copy of this resolution went to each of the broker-dealers.<sup>26/</sup> At the time this resolution was approved by the Council, at least five Council members fully understood what a margin account with a securities brokerage firm was and understood that it involved borrowing from the brokerage firm.<sup>27/</sup>

Councilman Olsen, then Chairman of the Business Affairs Committee, testified in his deposition that there was "quite a discussion"

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24. E.g., Broadbent depo. at 100; Hammond depo. at 17, 27; Taggart depo. at 120-29; Plowman depo. at 30-31; Bingham depo. at 12-13; Stockdale depo. at 42. Typical of those reports are Exs. 30 and 43. Admissions by Institutional Council members that they had received and reviewed such reports appear at, e.g., Harris depo. at 26, 50; Plowman depo. at 30-31; Stockdale depo. at 42. Furthermore, the minutes of the Business Affairs Committee meeting of June 26, 1971, record the distribution to all Council members of the March 31, 1971 investment position, which appears as the second to last page of Ex. 23. The Business Affairs Committee meeting minutes of March 25, 1972 record that the report of securities held by the University as of February 29, 1972 was distributed to all but two of the Council members. Ex. 86, March 25, 1972 meeting; Ex. 36.

25. Ex. 86, January 20, 1972 meeting; approval of the resolution by the Institutional Council as reflected in the Council meeting minutes of that day, Ex. 33 at 4.

26. See note 4 supra.

27. Council members Bullen, Hammond, Harris, Olsen and Bingham. Bullen depo. at 38, Hammond depo. at 11, Harris depo. at 25, Olsen depo. at 40, Bingham depo. at 9.

about this new resolution, and that Councilmen Harris and Robins expressed concern about the University purchasing securities on margin at that meeting.<sup>28/</sup> Notwithstanding those concerns, the new resolution was approved by the Council and was subsequently forwarded to all broker-dealers. A margin account, however, was opened with Merrill Lynch only, and interest paid to Merrill Lynch by the University on that account.

3. Initial Success of the Investment Program.

For the first year and a half the University's investment program achieved remarkable results. As of March 31, 1972, the University had an unrealized gain of some \$2.25 million.<sup>29/</sup> Vice President Broadbent testified that Council members were "awful happy. They never saw so much money made in their lives."<sup>30/</sup> At the business affairs committee meeting of March 25, 1972, Councilman Harris, then Chairman of that committee, praised the investment program.<sup>31/</sup> Council members and the University administration were, however, fully aware of the risks they were undertaking in their objective to maximize return on University investments.

4. Council Awareness of the Risks of the University's Investment Program.

President Taggart, for example, testified at his deposition that when the University entered into the investment program, he was aware that this new "aggressive" approach carried the risk of higher losses as well as the opportunity for higher returns, but that nonetheless

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28. Olsen depo. at 58, 64-66.

29. Ex. 58; Harris depo. at 32.

30. Broadbent depo. at 119.

31. Ex. 36.

he "did not consider it inappropriate to go this direction."<sup>32/</sup>

On June 11, 1971, Councilman Stockdale wrote a letter to Council Chairman Plowman which remarked on the "almost unbelievable success" of the program to that time, but which concluded with a prophetic warning:<sup>33/</sup>

I am 100 percent in favor of getting every penny we can from our idle funds but I do believe that we have a serious charge placed upon us when we invest public funds. If we do well, very few will remember but if some institution in the State of Utah should make a blunder and lose a half million dollars we would see criticism levied and legislation enacted which everyone would be sorry to see.

Mr. Stockdale advised Mr. Plowman in that same letter that he was "afraid" that he had "developed a much more conservative attitude" about the stock market than that which governed the University's investment program.

Council Chairman Robins wrote to Councilman Harris, Chairman of the Business Affairs Committee, on October 31, 1972, and advised Mr. Harris, after referring to "substantial losses we have incurred on our current portfolio" by that date that:<sup>34/</sup>

As you know, Jay Dee, I have sustained a fairly strong position advocating an investment policy designed to earn income well above the normally accepted "fixed rates of return." By its very nature this position implies that earnings will be large at times and losses will be suffered during other periods.

In April 1972, Councilman Harris expressed fear that the University would lose the substantial profits it had already accrued unless

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32. Taggart depo. at 41.

33. Ex. 21.

it abandoned its aggressive investment policy. At an investment committee meeting on that date which he had called, he explained that:<sup>35/</sup>

The meeting was called to get the University to get out of the investment business, and that was my recommendation even though the notes [minutes of the meeting] didn't show just that plain. But I said: "Look, you're sitting on a two and a quarter million dollar profit today," and that's the only profit anyone knew about in April because you had your March earnings report. "You've got only one way to go and that's lose it the way the interest market is going."

The investment committee did not follow Mr. Harris' recommendation. All others present voted for the continuance of the program.<sup>36/</sup>

At an investment committee meeting on November 10, 1972, seven Council members were advised that analysts and economists "do not predict a rosy picture for the stock market" for the coming year.<sup>37/</sup> Councilman Hammond inquired:<sup>38/</sup>

Is there any thought that we should be a little more conservative and work out a balanced investment program? I question whether we should invest so much in common stocks.

. . .

From my observations our present policy will make us the most money and lose us the most, also.

On November 10, 1972, Councilman Harris advised the Council that a decision would be made within three months to consider "putting more money into conservative items instead of those that carry high risks."<sup>39/</sup>

35. Ex. 39; Harris depo. at 31-32 (emphasis added).

36. Harris depo. at 32; Ex. 39.

37. Ex. 49.

38. Id.

39. Ex. 91 at 8 (emphasis added).

Mr. Harris believed the University had some high risk investments as early as April 1972.<sup>40/</sup> At the same meeting, however, Council Chairman Robins argued that:<sup>41/</sup>

I have maintained this position very strongly that we have an obligation to achieve rates of return higher than normal. I believe the market's trend over the past 100 years has gone up. Generally the trend is going to continue to go up.

Despite these strong concerns and the Council's full recognition of the high risks attendant to the kind of securities purchases they were making, no member of the Council ever moved at any Institutional Council meeting prior to December 1972 that the University's investment program be changed or that particular securities or classes of securities be sold. In December 1972 the Board of Higher Education ordered the Institutional Council to liquidate the high risk portion of its portfolio. By that time, a recession had occurred and many of the securities which the University had purchased had significantly declined in value.

5. Demise of the Investment Program.

The catalyst for the Higher Board's directions to the Institutional Council was an audit performed by Ernst & Ernst in the summer of 1972. In late November 1972, during the course of that audit, the accountants asked the Attorney General for his opinion of the legality of the University's investments.<sup>42/</sup> Before the Attorney General had responded in writing to that inquiry, certain members of the Higher Board met with some Institutional Council members and University

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40. Harris depo. at 39-40.

41. Ex. 49.

42. Ex. 79.



officers in Salt Lake City, on December 4, 1972.<sup>43/</sup> At that meeting, the Higher Board first directed the University to take "public funds out of securities other than those specifically ordered by statute."<sup>44/</sup>

Less than two weeks later the Attorney General issued a written opinion that it was unlawful for the University to invest State funds in types of securities not designated in Utah Code Ann. §33-1-1,<sup>45/</sup> and within a week the Higher Board again instructed the Institutional Council by letter to liquidate all its securities which were outside the ambit of that statute.<sup>46/</sup> The University eventually did liquidate much of its portfolio, allegedly at a loss of several million dollars.<sup>47/</sup>

6. The Council's Failure to Seek Legal Advice About the Legality of its Program.

Until Ernst & Ernst asked the Attorney General for an opinion of the legality of the University's investments, no University officer or Council member had ever asked counsel that question, even though they knew they had access to the Attorney General for legal opinions on University business.<sup>48/</sup> They did not seek such advice even though

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43. Ex. 85D, January 10, 1973 minutes at 3.

44. Id.

45. A copy of that Attorney General's opinion is attached to each copy of the brokers' joint memorandum in opposition to the University's motions for partial summary judgment, supra, n. 13 as Ex. B.

46. The letter from the Higher Board to the Institutional Council containing these instructions appears at 3 of the January 10, 1973 Council minutes, Ex. 85D.

47. Those alleged losses are set forth with particularity in the Exhibit "A" attached to each of the University's complaints against each defendant.

48. Councilman Olsen testified that the question of the University's capacity to invest was discussed, but he had no actual knowledge of this question ever being referred to the Attorney General. Olsen depo. at 20, 25, 30.



there were at least eight instances which might have raised this issue in their minds:

a. The Institutional Council stated in the first paragraph of the Investment Position and Policy,<sup>49/</sup> formally adopted in 1971, that:

Utah State University recognizes its responsibility to maximize the returns on the assets available for investment to support the University. As a public institution, it also recognizes its responsibility to protect the integrity of the public funds under its jurisdiction.

b-f. The issue of the University's capacity to purchase securities was presented to the Institutional Council on at least five separate occasions from September 19, 1970 to September 30, 1972, when the defendant broker-dealers each submitted resolutions calling for an official declaration of the University's power.<sup>50/</sup> On each such occasion, the Council represented that the University had power without limitation to purchase securities.

g. The Ford Foundation report which Council members brought back with them from the January, 1971 seminar in San Francisco contained a four page section entitled "Legal Questions", raising this issue.<sup>51/</sup>

h. "Quite a number of the business officers" of the University subscribed to or regularly received a periodical published by the National Association of College and University Business Officers entitled The College and University Business Officer, Studies and Management.<sup>52/</sup> The March 1972 issue contains an article entitled

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49. Ex. 24 (emphasis added).

50. E.g., Bear Stearns, R. 2003.

51. Ex. 96.

52. Broadbent, Depo. at 108.  
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"Current Trends in College and University Investment Policies and Practices," which Vice President Broadbent had reviewed, and which states at one point that:<sup>53/</sup>

Reports and articles are now accumulating with a common theme saying that revenue is anything legally available for expenditure. I would advise that an absolute first step is a written opinion by legal counsel for the specific institution.

When most lawyers are asked for an opinion, they seek to refer to governing laws.

Furthermore, although the Council was advised by the Attorney General in December 1972 that many of its investments were of questionable legality, it failed to advise any of the brokers of that fact or of the Attorney General's opinion until March 1973,<sup>54/</sup> even though all the resolutions it had addressed to the broker-dealers had stated that those resolutions were to remain in full force and effect until expressly revoked in writing.

7. Events From December 1972 to March 1973.

During the interim from December 1972 to March 1973, Mr. Catron, the University's investment officer, not only failed to liquidate the University's portfolio, but instead began to purchase additional securities in large amounts.<sup>55/</sup> The Council failed to detect his actions because Catron falsified reports to conceal those purchases and because the Council failed to provide any controls over his investment decisions.<sup>56/</sup> Not only had the Council given Catron respons-

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53. Ex. 35 at 3 (emphasis added).

54. Broadbent depo. at 200, 275, 276; Ex. 63.

55. For example, there is a statement to this effect by counsel for Utah State University. Broadbent depo. at 201.

56. Id. Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services Library Services and Technology Act, administered by the Utah State Library.



8. The Broker-Dealers' Reasonable Reliance on Council Resolutions.

Throughout the duration of the investment program, each of the defendant broker-dealers relied on the Council resolutions addressed to them, assuring them that the University had capacity and that Catron had authority to purchase and sell all manner of securities on the University's behalf.<sup>61/</sup> In most of these transactions, as has been noted, they acted only as agents and received no profits from the transactions other than commissions. Within a few days or weeks after receipt of each of those commissions, the broker-dealers paid those amounts out to satisfy other obligations.<sup>62/</sup> For that matter, amounts which they received on the few instances where they acted as principals were also paid out within a few days or weeks after the transactions had occurred.<sup>63/</sup> The broker-dealers did not know that the University was paying for these securities with funds which legally could not be used for their purchase.<sup>64/</sup> Nor were they aware of any fact which might have led them to believe that Catron was using such funds.<sup>65/</sup> They simply had no information as to the source of the funds which

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61. Merrill Lynch, R. 1433 (Stromberg Affidavit); id. at 1422 (Dunn Affidavit); Bear Stearns, R. 1998 (Cranston Affidavit); Vol. 22, R. 1975 (Kaplan Affidavit for Hornblower); Sutro, R. 122 (Juda Affidavit).

62. Id.

63. Id.

64. Id.

65. Id. sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services Library Services and Technology Act, administered by the Utah State Library.  
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they received, and reasonably believed that those funds were properly used to purchase the securities which Mr. Catron ordered.<sup>66/</sup>

B. Progress of This State Court Litigation.

1. Threshold Proceedings and Motions.

In late 1975, after all the University's federal court lawsuits had been finally resolved in favor of these broker-dealers, the University began to institute these suits in First District Court in Cache County.<sup>67/</sup> The complaint in each case is nearly identical: the parties are identified, and the University claims that each defendant executed orders for purchases and sales of securities set forth in an attached exhibit "A" to the complaints and that each broker-dealer charged commissions for those transactions, "at the behest of Catron." Each complaint then alleges that the defendant carried out Catron's instructions, using funds belonging to the University, that the University has since sold those securities, and that as a result of those sales it has lost the amounts set forth in each Exhibit "A". The University then prays for recovery of all its principal losses, all commissions paid to each broker-dealer, both prejudgment and post-judgment interest and the return of interest charges paid Merrill Lynch on its margin account.<sup>68/</sup>

The three broker-dealers whom the University initially sued immediately removed each of the cases to federal district court<sup>69/</sup> and

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66. Id.

67. The complaints appear at the following places in the record. Hornblower, R. 1, 47; Merrill Lynch, R. 1; Sutro, R. 1, 94; Bear Stearns, R. 72.

68. Bear Stearns, R. 72.

69. Id. at 70.

filed motions to dismiss for failure to state a claim<sup>70/</sup> and motions to dismiss for lack of personal jurisdiction.<sup>71/</sup> The personal jurisdiction motions were filed by all broker-dealers except Merrill Lynch.<sup>72/</sup> Although the broker-dealers requested oral argument on their threshold motions, the court ruled, in response to a motion to remand filed by the University, that the cases should be remanded to state court, and did remand them in June 1976 before reaching the broker-dealers' 12(b)(6) and personal jurisdiction motions.<sup>73/</sup>

Merrill Lynch then was sued and filed a motion for change of venue, seeking transfer of its case to Third District Court in Salt Lake County, on the grounds that it did business only in that county.<sup>74/</sup> The University filed a motion for partial summary judgment on the question of liability (reserving the question of damages for later determination) in the Sutro case only,<sup>75/</sup> and Sutro filed a motion to stay consideration of that summary judgment motion until the other

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70. Id. at 44.

71. Id.

72. Merrill Lynch was the only broker who acknowledged that it was doing business in the State of Utah, for which reason it did not file a motion to dismiss for lack of personal jurisdiction. Merrill Lynch has offices in the State of Utah only in Salt Lake County, however, and it therefore filed a motion for change of venue to the Third Judicial District Court. Merrill Lynch, R. 19. Defendant Bosworth Sullivan, represented by other counsel in these proceedings, similarly filed a motion for change of venue which was resolved at the same time as the motion filed by Merrill Lynch. Id. at 233.

73. Bear Stearns, R. 16.

74. Merrill Lynch, R. 19.

75. Sutro, R. 47.

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threshold motions had been adjudicated by the court.<sup>76/</sup>

After all those motions had been filed the broker-dealers suggested a sequence for considering them. The parties then briefed the personal jurisdiction and venue motions, and the court heard oral argument on those motions on October 18, 1976.<sup>77/</sup> All parties agreed at that hearing that the only issues before the court at that time were those of personal jurisdiction and venue.<sup>78/</sup> The court later denied the broker-dealers' motions on these two grounds.<sup>79/</sup>

One week after the court's memorandum decision denying the personal jurisdiction motions, to the surprise of all parties, the court issued a second memorandum decision, denying the brokers' 12(b)(6) motions.<sup>80/</sup> Inexplicably, the court also granted the University summary judgment against all broker-dealers despite the facts that (1) the broker-dealers and the University had stipulated that the court should resolve the threshold motions of personal jurisdiction and venue in all of the cases before proceeding to consider the University's motion for summary judgment in the Sutro action; (2) the University had not filed a motion for partial summary judgment against any broker-dealer but Sutro; (3) even in the Sutro case, Sutro had not yet had the opportunity to file any response to the University's motion, because the parties had agreed that none of the remaining

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76. Id. at 18.

77. The transcript of that October 18, 1976 hearing has been transcribed and is part of this record on appeal. Vol. 34.

78. Id. at 3.

79. Bear Stearns, R. 292.

80. Id. at 289.



motions would be briefed by the parties until the court had ruled on the threshold motions; (4) there had been no opportunity for oral argument of the University's motion before the court, despite the requirements of Rule 56 of the Utah Rules of Civil Procedure and the local rules of practice, which provide for such hearing;<sup>81/</sup> (5) the University had filed no memorandum opposing the brokers' 12(b)(6) motions in any of these cases; and (6) the motions to dismiss had never been submitted for decision by any party as required by Rule 2.8(c) of the Rules of Practice of District Courts in the State of Utah.<sup>82/</sup>

The broker-dealers responded by filing a motion to set aside the court's January 21, 1977 memorandum decision, on all the grounds just noted.<sup>83/</sup> The parties eventually stipulated that the court should set

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81. Rule 56(c), Utah R. Civ. P., provides that any motion for summary judgment "shall be served at least 10 days before the time fixed for the hearing," and that adverse parties may serve opposing affidavits "prior to the day of the hearing." If the granting of a hearing was discretionary to the court, the rule would so provide or would be completely silent on the need for a hearing.

Rule 2.8(e) of the Rules of Practice in the District Courts of Utah further provides that any party resisting a dispositive motion "may request oral argument on that motion, and such request shall be granted unless the motion has been summarily denied." Sutro requested oral argument, Vol. 16, p. 98.

82. Rule 2.8(c) of the Rules of Practice in the District Courts of the State of Utah provides:

The moving party may serve and file reply points and authorities within five (5) days after service of responding party's points and authorities. Upon the expiration of such five (5) day period to file reply points and authorities, either party may notify the clerk to submit the matter for decision.

83. Bear Stearns, R. 301.



aside orders it had entered consistent with its memorandum decision denying the broker-dealers' 12(b)(6) motions and that the court should also grant the broker-dealers' motions to set aside the court's January 21, 1977 memorandum decision which had granted the University summary judgment on liability.<sup>84/</sup> The court did enter orders in accordance with that stipulation.<sup>85/</sup>

2. The Broker-Dealers' First Rule 12(b)(6) Motions.

In a second attempt to establish an orderly sequence for disposing of the remaining motions filed with the court, the parties each proposed a sequence for ruling on those motions, and the court ruled on May 9, 1977, that the remaining motions would be treated in the following order: (1) the broker-dealers' 12(b)(6) motions would be briefed, argued, and ruled upon first; (2) if the court then denied those 12(b)(6) motions, the defendants would be granted time to file answers and third-party complaints and to file a joint memorandum in opposition to all pending motions for partial summary judgment filed by the University, and (3) the court set a time at which it would then proceed to rule upon those motions.<sup>86/</sup> All parties then filed memoranda with respect to the broker-dealers' 12(b)(6) motions,<sup>87/</sup> which

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84. Id. at 420.

85. Id. at 424, 428.

86. Order of August 29, 1977. Id. at 836. While the court did not sign those orders until August, it ruled during the course of a hearing on May 6, 1977 that it would resolve all pending motions in the manner reflected in its August order. The reporter's transcript of the May 6, 1977 proceedings with respect to that scheduling order appear in the record as Vol. 35.

87. Joint memorandum in support of motions to dismiss for failure to state a claim upon which relief can be granted, filed May 26, 1977. Id. at 553. Utah State University filed a joint memorandum in opposition to the motions to dismiss for failure to state a claim appears. Id. at 618. The defendants filed a joint reply memorandum in support of their motion to dismiss appears. Id. at 659.

the court denied on July 6, 1977 in another memorandum decision.<sup>88/</sup>

3. The Third-Party Actions and Counterclaims.

Following the denial of their Rule 12(b)(6) motions, the broker-dealers filed answers and counterclaims to the University's complaints and also filed third-party complaints seeking indemnity and contribution against officers of the University, Institutional Council members, and others.<sup>89/</sup> The broker-dealers also initiated discovery.<sup>90/</sup> All of the third-party defendants responded to the third-party complaints by filing motions to dismiss or for summary judgment<sup>91/</sup> and some third-party defendants moved to stay the broker-dealers' discovery and the court so ordered.<sup>92/</sup> The University also filed motions to dismiss the counterclaims filed by the broker-dealers against it.<sup>93/</sup>

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88. Mem. Dec. filed July 7, 1977. Merrill Lynch, R. 391.

89. Answer and counterclaim, Bear Stearns, R. 727. Third party complaints, id. at 748.

90. The brokers filed a request for production directed to the third-party defendants, a separate request directed to the Council as an entity, and requests for admission of fact and interrogatories directed to the University. Id. at 1599, 1906, 1911, 843, 776, 821, 902, 736, 846.

91. In the Bear Stearns file, those motions are: motion of the Institutional Council to dismiss third-party complaints for failure to state a claim for relief, motion to strike, and motion for judgment on the pleadings, id. at 1727; motion of third party defendant to strike third-party plaintiff's complaints, id. at 1057; motion of Utah State University to dismiss counterclaims, id. at 1035; motion of third-party defendant to dismiss third-party complaints, id. at 1070; motion to dismiss third-party complaint, or, alternatively, for summary judgment, id. at 925, 1788. Similar motions appear in all related actions.

92. Motions to stay discovery, id. at 807, 813; order, id. at 1296.

93. Bear Stearns, R. 1035.

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The court heard oral argument on the foregoing motions on November 21, 1977<sup>94/</sup> and in March 1978 granted all of the third-party defendants' motions to dismiss and for summary judgment and also granted the University's motion to dismiss the counterclaims.<sup>95/</sup>

In addition, despite the court's own scheduling order, despite the fact that the broker-dealers had not yet been given an opportunity to respond to the University's motions for partial summary judgment, despite the fact that there had been no hearing on that motion, and despite the fact that the broker-dealers' discovery had been stayed by the court, the court once again granted the University's motions for partial summary judgment on liability.<sup>96/</sup> And once again, in response to the broker-dealers' objection, the court entered another order withdrawing that portion of its memorandum decision which had granted summary judgment to the University.<sup>97/</sup> Thereafter, in late March and April 1978, the broker-dealers deposed, among others, those who had been members of the Institutional Council and officers of the University during the relevant time period.<sup>98/</sup>

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94. The transcript of that hearing is Vol. 38 of this record on appeal.

95. Mem. Dec. filed March 3, 1978. Bear Stearns, R. 1775.

96. Id.

97. Order of March 21, 1978. Id. at 1841.

98. Identical notices of deposition and subpoenas were filed in all related actions. The defendants' notices of taking depositions appear in the Bear Stearns file at 901, 782, 1812, 1920, 1793, 1893. Subpoenas Duces Tecum appear in that file at 1805 (directed to Dee Broadbent) and 1808 (directed to Ernst & Ernst). The depositions taken by all defendants in these related cases are volumes 41 through 62 of this record on appeal.

4. Final Rulings on the University's Partial Summary Judgment Motions and the Broker-Dealers' Second Rule 12(b)(6) Motions.

All parties briefed the University's motions for partial summary judgment in accordance with the court's scheduling order and the broker-dealers renewed their motions to dismiss for failure to state a claim.<sup>99/</sup> Defendants Merrill Lynch and Shearson Hammill also filed motions for summary judgment on the grounds that the University had suffered no damage as a result of its transactions with them.<sup>100/</sup>

On October 27, 1978, the court for the third time prematurely granted the University's motions for partial summary judgment and for the second time denied the broker-dealers' motions to dismiss for failure to state a claim.<sup>101/</sup> The court so ruled without permitting the broker-dealers a hearing which they requested and to which they were entitled.<sup>102/</sup> The court explained the basis for its decision:<sup>103/</sup>

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99. Second motion to dismiss for failure to state a claim upon which relief can be granted. Bear Stearns, R. 1984.

100. The memorandum filed by both those brokers appears in the Merrill Lynch file, R. 1401.

101. Mem. Dec. filed October 27, 1978. Bear Stearns, R. 2183.

102. Id. at 1987.

103. Id. at 2185-86.

This Court has repeatedly stated and now holds that in this case there are more than two parties interested in this matter and who have financial interest other than Utah State and the brokers and that is the taxpayers whose money was used in these transactions and whose money was lost by reason of these transactions. This Court feels that the brokers cannot escape liability for their illegal acts, acts with which they are charged legally with knowing to be illegal by saying officials of Utah State also knew this and were charged with this knowledge. The Court feels where a governmental entity is involved and the parties are charged with the legal use of public funds that the other illegal party cannot escape liability by saying the specific party we dealt with does not come into this matter with clean hands either.

In other words, the court ruled that, as a matter of law and regardless of what the facts might be, private parties dealing with governmental entities are strictly liable in ultra vires cases because they are charged with knowledge of that illegality, and that the government itself is never charged with the consequences of its own illegal actions.<sup>104/</sup>

Thereafter, following further proceedings to obtain final judgment in the third party actions, the broker-dealers (1) petitioned for intermediate appeal from the court's partial summary judgment ruling and its denial of their motions to dismiss and (2) filed final appeals from the third-party action dismissals. All those appeals have now been consolidated and this Court will be able to give the trial court the guidance it sought in its memorandum decision of January 9, 1979:<sup>105</sup>

[The Supreme Court can] make first a decision on liability. Of course, if they find no liability this would necessarily be as far as they would have to go and would decide all issues. If they decide there is liability on the part of the brokers to Utah State, they can then determine the position of the third party defendants.

104. The court so ruled even though both the court and counsel for the officers and Council members had indicated that those individuals should probably be charged with constructive knowledge that these transactions were ultra vires. Tr. of Nov. 21, 1977 hearing at 23 (remarks of the court), 57 (remarks of Mr. Campbell) (Vol.

## ARGUMENT

### INTRODUCTION

These cases present to this Court a major issue of public policy. That issue is whether there are, under any conceivable state of facts, any limits on the ability of the sovereign to recover against its innocent agents the losses which it sustains as a result of the proprietary and ultra vires conduct, negligence and irresponsibility of its own high public officers. These cases are before this Court, not after complete discovery and trial, but from Rule 12(b)(6) motions and motions for summary judgment.

Of course, on an appeal from a motion to dismiss, every allegation in the third-party complaint must be deemed to be true.<sup>106/</sup> To affirm the trial court's ruling on partial summary judgment, this Court must view the facts in the light most favorable to the broker-dealers and must find that there are indeed no material issues of fact created by any one of the broker-dealers' affirmative defenses.<sup>107/</sup> To affirm that partial summary judgment ruling, this Court must rule that the broker-dealers must be liable to the University regardless of the degree of wrongdoing by its own officers, regardless of the fact that the University here seeks to sue on contracts which it claims are illegal, and regardless of the fact that no private corporate or individual plaintiff could recover under facts similar to those already adduced in these cases.

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106. E.g., Walker Process Equip. v. Food Mach. & Chem. Corp., 382 U.S. 172 (1965) (re identical federal rule 12).

107. Hatch v. Sugarhouse Finance Co., 20 Utah 2d 156, 434 P.2d 758 (1968).

To affirm the decision below, this Court must bow to the archaic and discredited concept that the King can do no wrong in propriety as well as in governmental activities. To affirm the trial court's rulings, this Court must agree with the court below that the taxpayers are talismanic, that if any of their tax monies were ever paid on an ultra vires contract their money must be recovered by the sovereign who expended it, and that the sovereign may recover, not only against the parties to his transaction, but also against persons who acted only as intermediaries in those transactions, who received no profits apart from small commissions, and who are guilty of no wrongdoing greater than scrupulously following the instructions of the sovereign in carrying out those transactions. The Court must also rule that those private parties may not recover on those facts against the high public officers who induced them to carry out business for the sovereign.

When the trial court ruled, it did know that University officers and Council members had actual notice of every transaction at issue here, and had approved or ratified each such transaction both before and after it was executed, and had represented to the broker-dealers by official corporate resolution that the University had the power the University now denies. The trial court agreed that those persons must be charged with constructive notice that their conduct was ultra vires, <sup>108/</sup> i.e., that their conduct in supervising and approving these purchases was in excess of their statutory authority. It knew that those persons had been criticized by the State Auditor for delegating so much responsibility to Mr. Catron (negligence), and that they did

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108. Tr. of Nov. 21, 1977 hearing at 23 (Vol. 38). Counsel for most of the individual third party defendants essentially conceded this at the same hearing. *Id.* at 57 (remarks of Mr. Campbell). It is widely recognized that a public officer must take note of the extent of his own powers. *E.g., Casby v. Thompson*, 42 Mo. 133 (1868); *State v. Moreland*, 152 Okla. 37, 3 P.2d 803 (1931); *State v. Stone*, 266 Ala. 363, 71 S.2d 23 (1954).

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not advise the brokers that Catron's authority had been rescinded until March 1973 (a purely ministerial act). Its rulings in light of those facts are inexplicable and should be reversed.

It will be assumed arguendo for purposes of all the arguments in this brief, except for Arguments VI and VII in Part One, that all the stock purchases and sales at issue herein were indeed ultra vires under state law.

## PART ONE

### THE COURT ERRED IN GRANTING THE UNIVERSITY'S MOTIONS FOR PARTIAL SUMMARY JUDGMENT AND IN DENYING THE BROKER-DEALERS' MOTIONS TO DISMISS

#### I.

THE TRIAL COURT SHOULD HAVE HELD THAT THE UNIVERSITY  
IS ESTOPPED TO RECOVER ON THE TRANSACTIONS AT ISSUE HERE.

For nearly three years, from July 1970 to March 1973, the University's extensive investment program was closely supervised by the Institutional Council which instituted it. The Council's members were knowledgeable and sophisticated individuals,<sup>109/</sup> fully aware of the risks of loss which they had assumed for the University. To implement its carefully articulated goal of maximizing the University's investment returns, the Council approved at least five separate corporate resolutions addressed to the defendant broker-dealers, advising them that the University had power to purchase the securities at issue on margin or otherwise, that Broadbent or Catron had authority to order those securities on the University's behalf, and that all those resolutions would remain in full force and effect until expressly revoked in writing.

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109. Brief biographical sketches of several council members, developed from their depositions, are attached as Appendix A to this brief.



Nearly all of the securities purchased by the University from July 1970 to March 1973 were of a kind not mentioned in section 33-1-1 of the Utah Code. Assuming that the University could not lawfully purchase such securities, the trial court nevertheless should have held that the University is estopped from asserting claims for its investment losses against these broker-dealers, whose only sins were to believe and rely upon the formal action of the Institutional Council and religiously to carry out its instructions as its agents.

A. Application of Estoppel in Government Cases.

There are four elements of estoppel traditionally applied in suits involving both private and government parties, each of which is also present here:

1. The party to be estopped must know the facts;
2. He must intend that his conduct shall be acted on or must so act that the party asserting the estoppel has a right to believe it is so intended;
3. The latter must be ignorant of the true facts; and
4. He must rely on the former's conduct to his injury.<sup>110/</sup>

Despite the widespread application of the estoppel defense in private actions, the now largely discarded traditional view in the United States was that estoppel could not lie against the government.<sup>111/</sup> That principle has always been a branch of the doctrine of sovereign immunity.<sup>112/</sup> Sovereign immunity of course shields the

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110. United States v. Georgia-Pacific Co., 421 F.2d 92, 96 (9th Cir. 1970), quoting Hampton v. Paramount Pictures Corp., 279 F.2d 100, 104 (9th Cir. 1960).

111. 2 K. Davis, Administrative Law Treatise §17.01 at 491 (1958).

112. Id.

government from liability for its torts or breaches of contract. The traditional view of estoppel simply applied the same principle as a sword rather than a shield: the rule precluding estoppel meant that the government could not be barred from recovery against private parties regardless of its own torts or breaches of contract.

Whatever policy arguments might ever have supported the universal application of either of those principles have been seriously eroded, however.<sup>113/</sup> The traditional doctrine was first reversed in cases where the sovereign had acted in a proprietary rather than in a governmental capacity, i.e., where its conduct had a strong corollary in the marketplace and did not resemble the traditional functions of governing. E.g., Greenhalgh v. Payson City.<sup>114/</sup>

This Court has on several occasions recognized the impropriety of granting sovereign immunity to the government when engaged in proprietary functions: "Where a public body, which would otherwise be entitled to sovereign immunity, engages in an activity of a commercial or proprietary character, the protection does not exist."<sup>115/</sup> The brokers respectfully submit that few activities are more clearly "of a commercial or proprietary character" than the purchase and sale of the common stocks in the University's portfolio.

In fact, this Court was one of the earliest jurisdictions to apply estoppel against a governmental body. In Wall v. Salt Lake

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113. Mounting criticism by commentators led the courts to abandon these doctrines. See, e.g., Berger, Estoppel Against the Government, 21 U. Chi. L. Rev. 680, 686 (1954); Newman, Should Official Advice Be Reliable? -- Proposals as to Estoppel and Related Doctrines in Administrative Law, 53 Colum. L. Rev. 374 (1953).

114. 530 P.2d 799, 801 (Utah 1975).

115. Nestman v. South Davis County Water Improvement Dist., 16 Utah 2d 198, 201, 398 P.2d 203, 205 (1965). Accord: Gordon v. Provo City, 15 Utah 2d 287, 288-89, 391 P.2d 430, 431-32 (1964).

City,<sup>116/</sup> the Court estopped the municipality because of the equities present in that case:<sup>117/</sup>

[Here] the municipality, by its own affirmative acts, declarations, and conduct, misled the party, or induced him to believe that he had the right to rely upon the assurances which the municipality, after a long period of time, sought to repudiate to his injury.

Of course, not every representation by any governmental employee will give rise to a defense of estoppel. But where, as here, high ranking public officials reassure a private party who relies on their assurances of the validity of his action, estoppel will be applied by the courts. An early decision which is instructive on this question was issued by the United States Supreme Court one hundred years ago. Hackett v. City of Ottawa.<sup>118/</sup> The Court there held that officials of a municipal corporation who had represented under official corporate seal to a purchaser of municipal bonds that the bonds were being offered for a lawful purpose were estopped later to claim that the bonds were void and issued unlawfully.

As in these cases, the public entity made a representation under formal seal to a private party engaged in business with it that it had capacity to undertake that business, the private contracting party relied to his detriment on that representation, and it subsequently appeared that the sovereign's action exceeded its power under law. The Court noted that the "recitals of the bonds, in themselves, furnish no ground whatever to suppose that the Council transcended its authority, or issued them for other than [municipal] purposes. They

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116. 50 Utah 593, 168 P. 766 (1917).

117. Id. at 601, 168 P. at 769. Accord: Tooele City v. Elkington, 100 Utah 485, 594, 116 P.2d 406 (1941) (affirming the estoppel principles expressed in Wall).

118. 99 U.S. 86 (1878).

justify the opposite conclusion."<sup>119/</sup> It therefore estopped the city from declaring the bonds to be void.

B. Estoppel Should Be Applied Because the Broker-Dealers Cannot Be Charged With Constructive Notice That These Transactions Were Ultra Vires.

The trial court's sole basis for imposing liability on the defendants was its reiterated assertion that, because they are charged with constructive notice that the subject transactions were ultra vires, none of their affirmative defenses (including estoppel) could absolve them of liability on those transactions.<sup>120/</sup> The trial court erred in so ruling because the broker-dealers cannot be charged with constructive notice.<sup>121/</sup> The University should therefore be estopped

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119. Id. at 90.

120. Memorandum Decision of Jan. 9, 1979 at 3, R. 2202 (Bear Stearns).

121. The broker-dealers cannot be so charged because they did inquire about capacity and authority from the council, the governing body of the University. The cases support the logical conclusion that one who has made diligent inquiry is relieved of the burden of constructive notice:

It if appears that the person sought to be charged with notice was not heedless of the warning signals, but made inquiry and used due diligence to discover the facts which were suggested by the facts of which he had knowledge, and yet failed to obtain knowledge thereof, the inference of notice is rebutted and he is not affected thereby.

-- 58 Am. Jur. 2d, Notice, §10 (citations omitted).

Accord: Mercantile Nat. Bank v. Parsons, 54 Minn. 56, 55 N.W. 825 (1893); Federman v. VanAntwerp, 276 Mich. 344, 267 N.W. 856 (1936); Reconstruction Finance Corp. v. Cody Finance Co., 214 F.2d 695 (10th Cir. 1954).

Logically, the law is that if one is approached by an agent who represents that he has authority and that his principal has capacity to enter into a contract, the person to whom to go for reassurance of that capacity and authority is the principal himself, which the brokers did when they made these inquiries of the council.

E.g., American Surety Co. of New York v. Smith, Lantry & Co.,

to recover from them because its officers should be so charged, while the defendants are innocent of knowledge of illegality.

In holding that the city was estopped from declaring the bonds void and in excess of its power, the Supreme Court concluded in Hackett that the private contracting party was not put on any notice that those bonds were unlawful because the city's affirmative misrepresentations relieved him from ascertaining the legal limits of its power to issue such bonds. Under such circumstances, the court concluded,<sup>122/</sup>

It would be the grossest injustice, and in conflict with all the past utterances of this court, to permit the city, having power under some circumstances to issue negotiable securities, to escape liability upon the ground of the falsity of its own representations, made through official agents and under its corporate seal, as to the purposes with which these bonds were issued. Whether such representations were made inadvertently, or with intention . . . to avert inquiry . . . the city, both upon principle and authority, is cut off from any defense. . . .

The broker-dealers respectfully submit that a closer analogy to the facts present here would be difficult to create: in the cases, at bar, the governing body of the public corporation<sup>123/</sup> warranted under its official seal that the corporation had capacity and that its designated agents had authority to engage in all the transactions which it now asserts were ultra vires, its sole basis for imposing liability on the private parties through whom it effected those transactions. Under such circumstances, the brokers were relieved of any

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141 Neb. 719, 4 N.W.2d 889 (1942); State Bank of Binghamton v. Bache, 162 Misc. 128, 293 N.Y.S. 667 (S.Ct. 1937); Dodd v. First State Bank & Trust Co., 64 S.W.2d 1021 (Tex. Civ. App. 1933). Cf. Standard Parts Co. v. D&J Inv. Co., 288 P.2d 369 (Okla. 1955).

122. 99 U.S. at 96.

123. E.g., 553-42-15, 53-42-19, Utah Code Ann. (1969).

duty they might possibly have had to inquire into state statutes on the University's capacity to purchase and sell securities, as was the bond purchaser in Hackett. Accordingly, the University should be estopped to recover from them.

It is true that this Court has recognized the general principle, subject to exception, that persons dealing with public officers are bound to inquire into the limits of their authority. E.g., First Equity Corp. of Florida v. Utah State University.<sup>124/</sup> But in these cases, that duty of inquiry was fulfilled, as each of these brokers did in fact take action to resolve that precise question.<sup>125/</sup> There were no Institutional Council resolutions before the court in First Equity, so this issue was not addressed in that opinion.

C. Impact of Estoppel in These Cases.

To estop the University in these cases would not negate legislative restrictions on the University's investments. Indeed, following the investments at issue here the State Legislature, by the State Money Management Act of 1974, Utah Code Ann. §§51-7-1 et seq. (Supp. 1977), clarified the University's power to invest in securities. Estoppel of the University in this case would not set a precedent for allowing public officers to legislate by administrative fiat in future circumstances, but would only relieve private parties in egregious instances, as this Court did in Wall v. Salt Lake City, supra,<sup>126/</sup> from the consequences of their justified and detrimental reliance on sovereign warranties in limited circumstances where the sovereign has acted in a clearly proprietary capacity.

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124. 544 P.2d 887 (Utah 1975).

125. I.e., they requested and received the Council resolutions.

126. 50 Utah 593, 168 P.2d 666 (1947).  
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In the landmark decision applying estoppel to the government, the United States Supreme Court similarly allowed one individual to escape the burden of one statute, without relieving anyone else from compliance with that statute, under circumstances analogous to those present here. In Moser v. United States,<sup>127/</sup> a Swiss citizen relied on the express written assurances of a State Department officer that he would not be barred from seeking American citizenship if he applied for an exemption from military service. In fact, however, a federal treaty provided that exemption from military service would bar citizenship, so the public officer's warranty to Moser constituted an ultra vires promise to him. In allowing Moser to obtain citizenship despite the express provisions of the treaty, the Supreme Court explained:<sup>128/</sup>

Petitioner had sought information and guidance from the highest authority to which he could turn . . . . He was led to believe that he would not thereby lose his rights to citizenship. If he had known otherwise he would not have claimed exemption. In justifiable reliance on this advice he signed the papers sent to him by the Legation.

D. This Court, Like the Majority of Courts, Should Allow Estoppel Under These Circumstances.

In these cases, each broker asked for express assurances of the propriety of the University's conduct before agreeing to open an account for it, assurances which each broker received from the Council and upon which each broker justifiably relied. As was Moser, the brokers were "lulled . . . into misconception of the legal consequences" of their actions,<sup>129/</sup> and the trial court should have held that the University was estopped to recover under those circumstances.

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127. 341 U.S. 41 (1951).

128. Id. at 46.

129. Id.

In ruling for Moser, the Supreme Court simply applied in a governmental context the elementary principle of agency law which has long held the principal bound by the representations of his agent.<sup>130/</sup>

Similarly, in City of Marseilles v. Hustis,<sup>131/</sup> an Illinois court agreed in principle with Moser when it held that:

The general principle that a person takes the risk that the government officer to whom he speaks has the authority which he purports to have is not applicable here in light of the rule cited earlier to the effect that the doctrine of estoppel can be invoked where a party is induced by the conduct of municipal officers and where in the absence of relief he would suffer substantial loss.

In Franks v. City of Aurora,<sup>132/</sup> the Colorado Supreme Court estopped the City to repudiate the apparent authority of its city engineer, stating:<sup>133/</sup>

In considering whether the undisputed facts result in defendants' liability, it may be assumed that the engineer had no actual authority to modify the terms of this contract. . . .

It seems inconceivable that a municipal corporation can virtually supervise every detail of performance of an entire project and can long thereafter repudiate the supervisory authority of its own engineer adopting in retrospect the position that a contracting party should have disregarded the instructions of its own agent and should have adhered to the original specifications notwithstanding the engineer's disapproval. As we view it, the undisputed facts support a conclusion of justifiable reliance on the appearance of authority which was exhibited by these defendants. [Emphasis added]

Here, too, the Institutional Council and its Investment Committee were informed of every transaction upon which the University here

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130. E.g., Restatement of Agency Second, §§140, 141, 143.

131. 27 Ill. App. 3d 454, 325 N.E.2d 767, 769 (1975).

132. 147 Colo. 25, 362 P.2d 561 (1961).

133. 362 P.2d at 563.



seeks recovery over a period spanning almost three years. Each written resolution sent by the Council to the brokers was the subject of discussion at an Institutional Council meeting before its approval. Every element of estoppel, as applied against the government in the foregoing decisions and in many others, is present in these cases.

The only law cited by the University in support of its recovery in these actions is a collection of cases exclusively from other jurisdictions, most of which are more than thirty years old, many of which have subsequently been expressly overruled by later decisions in the same jurisdictions, and nearly all of which are limited to circumstances not present in these cases.<sup>134/</sup> The University has achieved, by virtue of the trial court's ruling on partial summary judgment, a giant leap backwards in the law to an outmoded application of a branch of sovereign immunity, a sterile concept which has always been devoid of logic in circumstances like those present here.

This Court should rule, in keeping with its own past decisions and the current majority of American courts, that the government must be estopped to recover under the circumstances present here. As Professor Davis has noted, the defense of estoppel against the government "now has almost uniform support of decisions of the 1970s: The doctrine of equitable estoppel does apply to the government."<sup>135/</sup>

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134. The University's case are distinguished in the brokers' joint memorandum opposing partial summary judgment at 56-64 (R. 2005, Bear Stearns file).

135. K. Davis, Administrative Law of the Seventies §17.01 (1976). That the government is a state or local government as opposed to the federal government makes no difference. Id. §17.06. Cases cited by Davis as evidencing the majority position that state and local governments can be estopped include, e.g., Fredericksen v. City of Lockwood, 6 Cal. 3d 353, 491 P.2d 805, 99 Cal. Rptr. 13 (1971); Yamada v. Natural Disaster Claims Comm'n., 54 Haw. 621, 513 P.2d 1001 (1973); Pilgrim Turkey Packers, Inc. v. Department of Revenue, 261 Or. 305, 493 P.2d 1372 (1972).

## II.

### THE UNIVERSITY SHOULD NOT BE ALLOWED TO RECOVER ON EXECUTED CONTRACTS EVEN IF THEY ARE ULTRA VIRES.

The one case which the trial court continually invoked in the course of proceedings below was a decision by this Court which refused to enforce an executory ultra vires contract and which left the parties where it found them. First Equity Corp. of Florida v. Utah State University.<sup>136/</sup> In that action, the plaintiff broker sought damages for securities which the University had ordered but never paid for. This Court simply applied in that case the long standing rule that parties to an illegal contract will be left where they are found.<sup>137/</sup>

The court below incorrectly concluded that, since the broker was not allowed to recover from the University in First Equity (on the grounds that the contract on which it sought recovery was ultra vires), it also follows that in these reversed situations, the University as a plaintiff is entitled to recover from the broker-dealers on its contracts, also on the sole ground that those contracts were ultra vires. Such a result is not only illogical but in fact derives no support from the First Equity decision, which simply refused to enforce an illegal contract. This Court should apply the same principle again in these cases and reverse the trial court's partial summary judgment order because of the fundamental principle that no one may recover on an executed illegal contract.

This Court has previously applied the same doctrine and left the parties where it found them. In Moe v. Millard County School District,<sup>138/</sup>

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136. 544 P.2d 887 (Utah 1975).

137. E.g., Second Russian Insurance Co. v. Miller, 268 U.S. 552, 562 (1925); Restatement of Contracts, §598 at 1109 (1932).

138. 54 Utah 144, 179 P.2d 980 (1947).

a private contractor entered into a contract with the school district to supply plumbing and heating fixtures for a school building. The contract was declared void because it exceeded the constitutional debt limit. While recognizing that the contractor could not recover money still due on his ultra vires contract, this Court also held that the contractor was not required to refund any of the payments already made under that contract by the school district. The Court explained:<sup>139/</sup>

We cannot perceive the necessity of refunding the money that was paid [to the contractor by the school district]. To that extent the contract has been executed, and there certainly is no good reason why in equity that matter should be reopened.

As in Moe, a school here seeks recovery on executed, allegedly ultra vires contracts. All the purchases and sales of securities which were the subject of those contracts have been fully consummated. Each time that the University ordered stocks through any of these defendants, it received precisely what it paid for. In Moe the contractor was allowed to retain payment for those plumbing and heating fixtures which he had already installed in a school building and which the school district therefore was allowed to retain. In this case, the University also kept all the items, i.e., securities, which it ordered from the broker-dealers and therefore, as in Moe, the matter in equity should be treated as closed.

In a later decision by this Court involving a contract between the same school district and another corporation, the Court again left the parties where it found them:<sup>140/</sup>

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139. Id. at 151-52, 179 P. at 983 (emphasis added).

140. Millard School Dist. v. State Bank of Millard County, 80 Utah 170, 185, 14 P.2d 967, 972 (1932) (emphasis added).

When an ultra vires contract with a corporation has been fully performed on both sides, neither party can maintain an action to set aside the transaction or to recover what has been parted with. In other words, neither a court of law nor a court of equity will interfere in such a case to deprive either the corporation or the other party of money or property acquired under the contract.

The University received precisely what it bargained for. The transactions are closed and equity requires that they remain closed. Such a result would also conform with the ruling of the United States Court of Appeals for the Tenth Circuit in the University's earlier federal suit, supra, that the University should not be allowed to "take advantage of its own wrongful acts."<sup>141/</sup>

B. Ultra Vires Payments Made Under Mistake of Law Cannot Be Recovered.

The University has alleged, as its sole basis for seeking recovery, that the payments in question were either ultra vires or were made under a mistake of law. Payments made under a mistake of law may not be recovered. It is beyond cavil that private parties may not recover under such circumstances, and a number of courts have likewise applied this principle to cases involving the sovereign. The principle is succinctly stated in the Restatement of the Law of Restitution, section 45:

Except as otherwise stated in Sections 46-55, a person who, induced thereto solely by a mistake of law, has conferred a benefit upon another to satisfy in whole or in part an honest claim of the other to the performance given, is not entitled to restitution.

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141. 549 F.2d at 168.

Comment c elaborates:

The rule stated in this Section applies to a person who pays his own money or transfers his own things. It applies likewise to a payment by an agent who, having power to bind his principal by his negotiations with third persons, pays a debt which the principal does not owe but which, because of his mistake of law, the agent believes to be due.

Precedents abound which rule that a party making voluntary payments under mistake of law may not recover.<sup>142/</sup> In a parallel case involving a broker, one court noted, "In the case at bar the contract is fully executed and there is no valid claim that the defendant's performance was in any way deficient."<sup>143/</sup> Quoting from Comet Theatre Enterprises v. Cartwright,<sup>144/</sup> that court concluded, "There is no equitable reason for invoking restitution where the plaintiff gets the exchange which he expected."<sup>145/</sup> The University has not alleged that the defendants' performance was in any way deficient. It has not alleged that it got anything from the exchange other than what it expected. There is therefore no possible reason to invoke restitution. Indeed, equity cries for a contrary result.

The rule that voluntary payment made under mistake of law is not recoverable must be applied to transactions with the State of Utah, at least under the facts present here. When government enters into contracts it is governed by contract law -- whether it is the United States, a state, a municipality, or a college. As Justice Brandeis elaborated, "When the United States enters into contract relations,

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142. E.g., Railroad Co. v. Commissioners, 98 U.S. 541 (1878); City of Philadelphia v. Collector, 72 U.S. 720 (1866); Connecticut Mutual Life Ins. Co. v. Stewart, 95 Ind. 588 (1884).

143. Richardson v. Roberts, 210 Cal. App. 2d 603, 26 Cal. Rptr. 829, 831 (Dist. Ct. App. 1962).

144. 195 F.2d 80, 83 (9th Cir. 1952).

145. 26 Cal. Rptr. 834.

its rights and duties are governed generally by the law applicable to contracts between private individuals."<sup>146/</sup> Like the United States, the State of Utah is likewise subject to the commercial law applicable to contracts between private individuals when it engages in commercial activity. It matters not whether the contracting party is "a State or a municipality or a citizen."<sup>147/</sup>

For the independent reason that the courts abhor illegal contracts and that they will leave the parties to those contracts where they find them, particularly where payment is made under mistake of law, this Court should reverse the trial court's partial summary judgment in favor of the University and should remand the case with instructions to the court to enter judgment in favor of the broker-dealers on their motions to dismiss for failure to state a claim.

### III.

#### TO ALLOW THE UNIVERSITY TO RECOVER AGAINST THESE BROKERS WOULD DENY THEM DUE PROCESS AND EQUAL PROTECTION OF LAW.

The trial court's denial to the brokers of all the affirmative defenses which they asserted in answering the University's complaints constituted a violation of the due process and equal protection clauses of the Utah and United States Constitutions.<sup>148/</sup> The court's ruling denied the brokers equal protection of the laws because the court engaged in a classification for purposes of this suit which is

146. Lynch v. United States, 292 U.S. 571, 579 (1933).

147. Sinking Fund Cases, 99 U.S. 700, 719 (1878). See, e.g., Lynch v. United States, 292 U.S. 571, 579 (1934); Cobb v. City of Malden, 105 F. Supp. 109, 112 (D. Mass. 1952). Accordingly, the general rule that payments made under mistake of law cannot be recovered is applicable in cases where the government is a party. Olympic Steamship Co. v. United States, 165 F. Supp. 627, 631 (W.D. Wash. 1958). Accord, Railroad Co. v. Commissioners, 98 U.S. 541 (1878); United States v. Edmondston, 181 U.S. 500 (1901).

148. Utah Const. Art. I, §2, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.



devoid of rational basis. The court denied the broker-dealers due process of law by its ruling that their property may be taken by the University despite all the defenses they asserted which are usually available in actions like those at bar.

The trial court's refusal to recognize the defense of estoppel in this proprietary conduct case constitutes an irrational and overbroad classification, since the government's right to resist estoppel is properly no broader than its right to invoke sovereign immunity. The classification of the University as an entity immune from the defense of estoppel is irrational because it serves no legitimate state purpose, as both the legislature and this Court<sup>149/</sup> have expressly recognized that there is no justification for special treatment of the sovereign where it acts in a proprietary capacity.

As explained earlier, the class of persons subject to the defense of estoppel has traditionally included all private plaintiffs, whether individual or corporate, and has also traditionally included sovereign plaintiffs in cases involving ordinary business transactions.<sup>150/</sup> To exempt the University from the class of those persons subject to the defense of estoppel must be based on some legitimate legislative or public policy purpose, which clearly does not exist here. The trial court's classification of the University cannot stand by virtue of

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149. Utah Governmental Immunity Act, §§63-30-3 et seq., Utah Code Ann. (Supp. 1978). Greenhalgh v. Payson City, 530 P.2d 799, 801 (Utah 1975) ("It is therefore our conclusion that proprietary functions of a municipality are not within the coverage of the Utah Governmental Immunity Act."). To the same effect are Utah Supreme Court decisions preceding enactment of the Governmental Immunity Act. Nestman v. South Davis County Water Improvement Dist., 16 Utah 2d 198, 201, 398 P.2d 203, 205 (1965); Gordon v. Provo City, 15 Utah 2d 287, 288-89, 391 P.2d 430, 431-32 (1964).

150. E.g., cases cited by Professor Davis in support of his conclusion that estoppel is freely available against the government at this time, supra n. 135.

the equal protection principles expressed by this Court in Child v. City of Spanish Fork:<sup>151/</sup>

[Individuals] may be treated differently by the law . . . which divides them into classifications, if the classifications have a reasonable relationship to a proper and lawful purpose, and if all persons within the same class are treated equally.

Similarly, the special protection accorded to the University by the trial court offends due process of law, because the trial court stripped the defendant brokers of the defenses which they would have been entitled to had the state not been a party plaintiff. The Supreme Court of West Virginia, in a decision which is instructive here, held that the state was not entitled to assert the defense of sovereign immunity in response to a counterclaim filed against it by the defendant. State v. Ruthbell Coal Co.<sup>152/</sup> Dismissing plaintiff's claim of immunity, the court explained:<sup>153/</sup>

Plaintiff first came into a circuit court far removed from the place of defendant's corporate activities, and hailed defendant . . . to the bar of that court. Why then is plaintiff not bound by the same rules of procedure as any party litigant? In invoking the jurisdiction of the Circuit Court . . . plaintiff, in our opinion, has taken the position of an ordinary suitor, and even if plaintiff is "a direct governmental agency of the State", . . . the State has laid aside its sovereignty and the concomitant immunity from an action or suit . . . and defendant, therefore, is entitled to assert by pleading and proof all matters purely defensive.

The court held that to deny defendant the right to counterclaim would violate due process:<sup>154/</sup>

We think it would be unconscionable and contrary to the due process clauses contained in the Fourteenth Amendment to the Constitution of the United

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151. 538 P.2d 184, 187 (Utah 1975).

152. 133 W.Va. 319, 56 S.E.2d 549 (1949).

153. 56 S.E.2d at 555.

154. Id. at 556.



States, and Article III, Section 10 of the West Virginia Constitution, to permit the State, as a plaintiff, to bring a citizen into court for the purpose of asserting liability against such citizen, and then strip that citizen of all the procedural rights and defenses which he would have if the State had not been a party plaintiff.

Likewise, in these cases, the trial court's refusal to recognize the estoppel and other defenses asserted by the brokers was a denial to them of due process of law. For these independent constitutional reasons, the court's partial summary judgment ruling should be reversed, and the court below should be directed to enter judgment in favor of the defendant brokers.

#### IV.

THE TRIAL COURT ERRED IN ENTERING SUMMARY JUDGMENT FOR THE UNIVERSITY, BECAUSE THE BROKER-DEALERS WERE ONLY AGENTS OF THE UNIVERSITY, NOT PARTIES TO THE TRANSACTIONS.

Defendants Hornblower and Sutro acted only as agents for the University in all of these transactions.<sup>155/</sup> Defendant Bear Stearns acted primarily as an agent for the University, and acted as principal only in a few transactions.<sup>156/</sup> Merrill Lynch acted partly as a principal, but primarily as an agent. But the University made substantial profits on all securities purchased through Merrill Lynch, for which reason Merrill Lynch filed a motion for summary judgment in the court below.<sup>157/</sup> All the defendant broker-dealers, when acting as agents, were paid by the University for securities purchased and the

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155. Affidavits cited supra n. 5.

156. Affidavit of David Cranston, Bear Stearns action, R. 1998.

157. That motion was denied by the court below, not because the University had not in fact made money through Merrill Lynch, but only because of the court's uncertainty as to whether the University's theories of recovery for prejudgment interest might still entitle it to some nominal recovery. Tr. of Dec. 4, 1978 hearing at 8:44:39 (Vol. 40)

broker-dealers in turn passed on these payments to the sellers of the securities. The broker-dealers only retained commissions for their services.<sup>158/</sup> The University's ultra vires purchases and sales, therefore, were entered into with the third party sellers, not with these broker-dealers.

Assuming arguendo that the University is entitled to unwind the hundreds of purchases it ordered over a three year period, the most it is entitled to recover from these broker-dealers is the benefit they received, which is limited to their commissions. It is well established that an agent is not liable on a contract executed by him on behalf of another and for this reason the University may not recover its principal losses from these broker-dealers.<sup>159/</sup>

In Unger v. Travel Arrangements, Inc.,<sup>160/</sup> a customer sued a travel agency to recover the amount he had paid the agency for a trip later cancelled by a steamship company which became insolvent. Since the travel agency had passed the money on to the steamship company in the reasonable belief that the company was solvent, the court held that the most the plaintiff could recover was any commission retained by the travel agency.<sup>161/</sup> The court ruled:<sup>162/</sup>

158. Affidavits cited supra n. 5.

159. Fink v. Montgomery Elevator Co., 161 Colo. 342, 421 P.2d 735 (1966); General Motors Acceptance Corp. v. Turner Ins. Agency, Inc., 96 Idaho 691, 535 P.2d 644 (1975); Seigworth v. State, 91 Nev. 536, 539 P.2d 464 (1975); Restatement (Second) of Agency §320 (1958).

160. 25 A.D.2d 40, 266 N.Y.S.2d 715, 721 (S.Ct. 1966).

161. 266 N.Y.S.2d at 721.

162. Id. at 721-22, citing, e.g., Restatement of Restitution §143(b); Restatement of Agency, §339(f); Weiner v. Roof, 19 Cal. 2d 748, 752, 122 P.2d 896, 898 (1942). This principle reflects the majority view. E.g., Bailey v. Reiman, 118 Cal. App. 2d 131, 257 P.2d 94 (1953) (where an agent receives and delivers property honestly and openly, the agent is not liable to anyone thereafter for money received and transmitted); Karras v. Trione, 135 Colo. 229, 310 P.2d 560 (1957) (rental agent not liable for return of rent deposit); United States Nat'l. Bank v. Stonebrink, 200 Ore. 176, 265 P.2d 238 (1954).

The fact that the agent credits the principal with the amount received does not release the agent from his obligation to make restitution so long as he continues to hold the money on behalf of the principal, . . . but when the agent parts with the money in accordance with the agency, he is released from liability.

Because the broker-dealers here no longer have possession of the funds paid to them by the University, the University may not recover from them. The trial court erred in granting the University partial summary judgment, and its order should be reversed.

V.

THE TRIAL COURT ERRED IN HOLDING THE BROKER-DEALERS LIABLE TO THE UNIVERSITY BECAUSE THEY HAD REASONABLY AND IN GOOD FAITH CHANGED THEIR POSITION IN RELIANCE UPON THE REGULARITY OF THE TRANSACTIONS HERE AT ISSUE

For nearly three years and on hundreds of occasions, the broker-dealers received from the University payments for the purchases of the securities at issue here. In turn, the broker-dealers passed on to the University the security certificates and passed on the purchase price to the sellers. The broker-dealers retained only their commissions as their benefit of the bargain. These commission payments were paid out through the ordinary course of business to satisfy the regular expenses of the broker-dealers. In so doing, the broker-dealers reasonably and in good faith changed their position in reliance on the regularity of the transactions ordered by the University. The University should not be allowed to recover monies delivered to the broker-dealers which haveong since been disbursed.

Any action for restitution, including the actions brought here by the University, is based upon fundamental equitable principles. As explained in comment C to Section 1 of the Restatement of Restitution:

Even where a person has received the benefit from another, he is liable to pay therefor only if the circumstances of its receipt or retention are such that, as between the two persons, it is unjust for him to retain it.

Or, as Justice Cardozo succinctly explained, "The plaintiff must show that it is against good conscience for the defendant to keep the money."<sup>163/</sup>

The expenditure of funds wrongly received is a significant change of circumstances that warrants denial of restitution. Sawyer v. Mid-Continent Petroleum Corp.<sup>164/</sup>

Because the broker-dealers changed their position over a three year period and relied in good faith on the regularity of the numerous transactions at issue, the University should in equity be precluded from undoing those transactions. The trial court's judgment in favor of the University on liability should therefore be reversed.

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163. Schank v. Schuchman, 212 N.Y. 352, 358, 106 N.E. 127, 128 (1914).

164. 236 F.2d 518 (10th Cir. 1956). There, the plaintiff oil company brought an action for restitution of money paid to defendant lessors as compensatory royalties in lieu of drilling a well on an oil and gas lease granted by the defendants. The compensatory royalty agreement was executed by the plaintiff lessee under the false assumption that the lease agreement contained the usual provision requiring a lessee to either drill a well or pay a compensatory royalty. Because of the mistake, the court ordered restitution but held that equity required the deduction of any expenditures or expenses incurred by the [defendants] because of the receipt of the monies, inasmuch as they were guilty of no fraud or deception." Id. at 522.

Section 69 of the Restatement of Restitution elaborates: "The right of a person to restitution from another because of a benefit received because of mistake [of fact or law] is terminated or diminished if, after the receipt of the benefit, circumstances have so changed that it would be inequitable to require the other to make full restitution."

VI.

THE UNIVERSITY HAD AUTHORITY TO INVEST NON-APPROPRIATED FUNDS IN COMMON STOCK, AND BECAUSE CATRON WAS A FIDUCIARY OF THE UNIVERSITY, THE BROKER-DEALERS ARE NOT LIABLE TO IT EVEN IF IT HAD NO AUTHORITY TO INVEST APPROPRIATED FUNDS IN COMMON STOCK.

The University pooled both state appropriated and non-appropriated funds to purchase the securities at issue.<sup>165/</sup> The University had clear authority to invest its non-appropriated funds in common stock, as evidenced by three Attorney General opinions.<sup>166/</sup> It of course follows that, if the University could purchase stocks and other securities, it could make commissions and interest payments incidental thereto.

In addition to state appropriations, the University also receives money from gifts, grants, tuition payments, dormitory rental, food services and printing operations.<sup>167/</sup> Several statutes expressly authorize the University to convert such funds into other property and expressly authorize the University to invest and manage those

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165. Response to First Set of Interrogatories to Plaintiff, dated April 18, 1978, R. 1938 (Bear Stearns).

166. Exs. B and C to the brokers' joint memorandum in opposition to the University's motions for partial summary judgment. R. 2005 (Bear Stearns); Madsen Depo. at 19-20. Mr. Madsen was the Assistant Attorney General assigned as counsel to the University.

167. Sherrat Depo. at 26-28; Response to First Set of Interrogatories to Plaintiff, April 18, 1978, R. 1938 (Bear Stearns).

funds and their proceeds.<sup>168/</sup> It should therefore be clear that the University may invest such funds in common stock.

This issue was squarely decided by the Indiana Supreme Court in Sendak v. Trustees of Indiana University.<sup>169/</sup> The Indiana Attorney General there challenged the University's power to invest in common stock with funds received from private gifts and bequests. The court

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168. Utah Code Ann. §53-32-4 provides, in pertinent part:

The Utah State Agricultural College [Utah State University of Agriculture and Applied Science] in its corporate capacity may take by purchase, grant, gift, devise or bequest any property real or personal for the use of any department of the college and for any purpose appropriate to the objects of the college. It may convert property received by gift, grant, devise or bequest and not suitable for its uses into other property so available or into money. Such property so received or converted shall be held, invested and managed and the proceeds thereof used by the board of trustees for the purposes and under the conditions prescribed in the grant or donation.

It must be noted that the recently enacted State Money Management Act, §§51-7-1 to -21 (Supp. 1977), for the first time places legislative restrictions on the kinds of common stock that properly can be purchased with funds from these sources. However, no such legislative restrictions existed at the date of the transactions here at issue.

Utah Code Ann. §53-48-10(4) (1970) provides:

The dedicated credits, such as tuitions, fees, federal grants, and proceeds from sales, received by the university and colleges may be retained by these institutions and used in accordance with each institutional work program.

In addition, section 53-48-20(3), authorizes the University to invest all funds it receives to support research.

Each of the foregoing statutes therefore authorizes investments in common stock of non-appropriated funds.

169. 254 Ind. 390, 260 N.E.2d 601 (1970).



held, under statutes considerably less expansive than the foregoing Utah statutes,<sup>170/</sup> that the State of Indiana was not the owner of these non-appropriated funds, and that the University's Board of Trustees acted in the capacity of private trustees over such funds and were subject only to the limitations placed upon those gifts by the donors.<sup>171/</sup> Therefore, the Trustees could properly invest non-appropriated funds in common stock.

Since the University had authority to invest at least its non-appropriated funds in common stock, it follows as a matter of law that the University is barred from recovery by virtue of the Uniform Fiduciaries Act.<sup>172/</sup> Mr. Catron was clearly acting as a fiduciary of the University when he purchased these stocks, as fiduciaries are defined in section 22-1-1 to include agents and officers of public or private corporations.<sup>173/</sup>

Section 22-1-5 provides that, whenever a fiduciary draws a check in the name of his principal and that fiduciary is empowered to write checks on behalf of his principal for any purpose, "the payee is not bound to inquire whether the fiduciary is committing a breach of his

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170. Accordingly, this statement by the Indiana Supreme Court becomes even more compelling when applied to the University, with its considerably broader statutory power to invest in common stocks with private endowment funds.

171. 260 N.E.2d at 603.

172. §§22-1-1, et seq., Utah Code Ann. (1976).

173. §22-1-1 defines fiduciaries to include:

a trustee under any trust, expressed, implied, resulting or constructive, executor, administrator, guardian, conservator, curator, receiver, trustee in bankruptcy, assignee for the benefit of creditors, partner, agent, officer of a corporation, public or private, public officer, and any other person acting in a fiduciary capacity for any person, trust or estate. [emphasis added].

obligation as fiduciary . . . and is not chargeable with notice that the fiduciary is committing a breach of his obligation as fiduciary," unless the payee has actual knowledge of that breach of duty.<sup>174/</sup>

It follows, by virtue of the operation of the Utah Uniform Fiduciary Act, that the broker-dealers were not put on constructive notice that Catron might be violating a fiduciary duty to the University when he had checks drawn on its behalf to pay for stocks, and since the broker-dealers also had no actual notice of any such breach of duty, they must be relieved of liability to the University. Accordingly, the trial court's finding that the broker-dealers are liable to the University should be reversed.

#### VII.

THE UNIVERSITY HAD AUTHORITY TO INVEST ANY OF ITS FUNDS  
IN COMMON STOCK AND THE TRANSACTIONS HERE AT  
ISSUE ARE NOT ULTRA VIRES.

The University alleges that it did not have power to enter orders for the purchase of securities with the broker-dealers. As a matter of law, the University did have such power because (1) the University has a traditional legislative general grant of authority to handle its finances, including investments, and (2) the legislature specifically granted the University the power to invest in the securities purchased.

This Court, in First Equity Corp. v. Utah State University,<sup>175/</sup> has held that at least some of the University's funds could not be invested

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174. Id., §22-1-5 (emphasis added).

175. 544 P.2d 887 (Utah 1975).



in common stocks. We believe that this decision was erroneous and now urges this Court to reconsider and overrule First Equity. The grounds for overruling that decision are set forth in this argument, but we hasten to add that, even if the Court does not overrule its prior decision in First Equity, the brokers are still entitled to judgment in their favor by virtue of each of the foregoing independent arguments.

In 1888 the Territorial Assembly authorized the existence and operation of an agricultural college, later to become the University, and specified the powers of the trustees of that college, which included "the general control and supervision of the agricultural college, . . . of all appropriations made by the Territory for the support of the same."<sup>176/</sup> In 1892 the Territorial Assembly broadened the powers of the trustees by authorizing them "to exercise such other powers as might be incidental or necessary to carry out the express powers."<sup>177/</sup>

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176. Agricultural College Act, §4, 1888 Utah Laws 215.

177. This is noted in Spence v. Utah State Agricultural College, 119 Utah 104, 113, 225 P.2d 18, 23 (1950).

The University still has authority to exercise any "other necessary and proper . . . powers and authority not specifically denied to the Institution." §53-48-15(7), Utah Code Ann. This "necessary and proper" language of course echoes Article I, §8 of the Federal Constitution, which Chief Justice Marshall had occasion to interpret in McCulloch v. Maryland, 4 Wheat. 316 (1819). The discussion of that grant of power by the Chief Justice bears repetition here:

Congress is authorized to pass all laws "necessary and proper" to carry into execution the powers conferred on it. These words "necessary and proper," in such an instrument, are probably to be considered as synonymous. Necessary powers must here intend such powers as are suitable and fitted to the object; such as are the best and most useful in relation to the end proposed. If this be no so, and if Congress could use no means but such as are absolutely indispensable to the existence of a granted power, the government would hardly exist; at least, it would be wholly inadequate to the purposes of its formation.

When the Utah State Constitution was enacted in 1896, it preserved to the University "all the rights, immunities, franchises and endowments heretofore granted or conferred" to the University.<sup>178/</sup> Essentially the same powers conferred on the Board of Trustees in 1892 were again conferred upon the University's Board of Trustees by the legislature in 1919,<sup>179/</sup> and were preserved in 1969, when the legislature eliminated the Board of Trustees and created a State Board of Higher Education, which succeeded to the trustees' former powers.<sup>180/</sup> Each of these statutes from 1888 to 1969 expressly conferred authority on the University's governing board to have general control of the college and of all appropriations made by the State to the college.

In addition to the foregoing general grants of power to the University to manage and invest its appropriations, the legislature has also given the University specific grants of authority to invest in securities. Section 53-32-4 gives the University full power to receive and re-invest personal property. Section 53-48-20(3) of the Higher Education Act authorizes the University to invest all funds and proceeds received from research programs.

The only statutory limitation upon which the University has ever based a claim that these funds are ultra vires, and upon which this Court based its ruling in First Equity, is Section 33-1-1, which simply supplements powers of public bodies and others to invest in

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Similarly, if the University had authority only to exercise specifically delegated powers, it too could hardly exist. This grant of necessary and proper authority to the University in conjunction with its broad general grant of authority to invest real and personal property must be construed to empower the University to purchase and sell common stocks, since there was, at the time of these investments, no express statutory restriction on that power.

178. Article X, Sec. 4, Utah Constitution.

179. Utah State Agricultural College Act, §15, 1919 Utah Laws 45.

180. Utah Code Ann. §53-48-4 (1970).  
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securities. The act states on its face at section 33-1-3, that its provisions are "supplemental to any and all other laws relating to and declaring what shall be legal investment for the . . . organizations . . . referred to in this Act."

Given both the general and specific statutory grants of authority to the University to invest funds it receives, and the fact that the University is not restricted to the securities identified in section 33-1-1 this Court should conclude that the University had power to invest in the securities at issue here, and should therefore reverse the trial court's finding that the broker-dealers are liable to the University.

#### VIII.

#### THE TRIAL COURT ERRED IN DENYING THE BROKER-DEALERS' MOTIONS TO DISMISS FOR FAILURE TO STATE A CLAIM.

In addition to the foregoing erroneous rulings by the trial court, it also erred when it denied all broker-dealers' Rule 12(b)(6) motions to dismiss for failure to state a claim. The broker-dealers respectfully request that this Court reverse those rulings.

As noted in the preliminary factual discussion in this brief,<sup>181/</sup> the broker-dealers filed two Rule 12(b)(6) motions during the course of proceedings below. The first motion was denied before the broker-dealers filed their counterclaims and cross-claims,<sup>182/</sup> and their second 12(b)(6) motion was denied at the time the court granted the University's motion for partial summary judgment.<sup>183/</sup>

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181. See text supra nn. 86 and 99.

182. Order cited supra n. 88.

183. Order cited supra n. 101.

When the broker-dealers filed their first motion to dismiss they had not yet had occasion to undertake any formal discovery, but they did present the court with the following uncontroverted facts, ascertained through informal discovery and information in their own business records:

1. The University opened its accounts with each broker-dealer with the full knowledge and express prior written authority of its principal officers and the Institutional Council (i.e., the written resolutions, one of which is attached to the broker-dealers' memorandum as Exhibit B).<sup>184/</sup>

2. The University heirarchy never advised the broker-dealers that it might lack power to purchase common stock.

These facts are essentially the same as those developed during discovery, which merely supplemented these basic points and demonstrated the remarkable degree to which each of these transactions was monitored by the Council. When the broker-dealers' second motion to dismiss was denied by the court, it of course had before it all the facts set forth in this brief, as each of them was argued in the broker-dealers' joint memorandum opposing the University's partial summary judgment motion.<sup>185/</sup>

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184. This statement of facts presented to the court is greatly summarized in this text. Many of the facts subsequently further developed during the course of discovery were also initially raised in support of the brokers' original motions to dismiss for failure to state a claim.

185. All those facts are set forth at length in the statement of facts in the brokers' joint memorandum in opposition to the University's motions for partial summary judgment, dated May 15, 1978, at 4-22. R. 2005 (Bear Stearns).

In support of both of their motions to dismiss the broker-dealers raised a number of grounds for dismissal which they also raised as affirmative defenses to the University's complaints, and which they therefore also raised as grounds for opposing summary judgment in favor of the University. Because those arguments and defenses are discussed in detail in preceding arguments they need not be reiterated here.

The arguments the broker-dealers raised to support their motions to dismiss were:

1. The University should be estopped to recover here (Argument I, supra).
2. The University may not recover on executed illegal contracts (Argument II, supra).
3. Allowing the University to recover would deny the broker-dealers due process and equal protection of law (Argument III, supra).
4. The University had authority to invest non-appropriated funds in common stock, and because Catron was a fiduciary of the University, the broker-dealers may not be held liable to it (Argument VI, supra).
5. The University had power to invest all its funds in common stock and these transactions were not ultra vires (Argument VII, supra).

Each of the foregoing grounds should have been independently sufficient to result in judgment for the broker-dealers on their motions to dismiss. They therefore request that this Court reverse the trial court's rulings on those motions and direct it to enter judgment in their favor. Even if the Court refuses to direct entry of judgment in their favor on those 12(b)(6) motions they respectfully request that it reverse the order allowing partial summary judgment to the University and allow them to raise and prove each of those defenses in further proceedings.

#### CONCLUSION TO PART ONE

On each of the foregoing independent grounds, the broker-dealers submit that the trial court erred in granting the University partial summary judgment and in denying the broker-dealers' motions to dismiss for failure to state a claim. Both of those rulings should be reversed and judgment should accordingly be entered in favor of the broker-dealers.

## PART TWO

### THE TRIAL COURT ERRED IN DISMISSING THE BROKER-DEALERS' THIRD-PARTY ACTIONS AND COUNTERCLAIMS.

#### INTRODUCTION

The foregoing arguments demonstrate that the University should not be entitled to recover any sums from the broker-dealers. If the Court rules, as the broker-dealers have requested, that they cannot be liable to the University under any of those theories, then it might appear that there is no need to consider the question of reversing the trial court's entry of final judgment in favor of the third-party defendants and the University on the broker-dealers' third-party complaints and counterclaims.

In fact, however, even if this Court does reverse the trial court's summary judgment ruling, the broker-dealers should be entitled to proceed on their third-party actions and counterclaim anyway, as they seek indemnity and contribution against University officers and Institutional Council members, not only for any damages eventually awarded to the University in its complaint against the broker-dealers, but also for costs and attorneys' fees expended by the broker-dealers in defending the University's actions.<sup>186/</sup>

The broker-dealers also request that this Court order the counterclaims and third-party actions to be reinstated if it does not reverse the trial court's partial summary judgment ruling.

The broker-dealers' claims for indemnity or contribution are based upon theories of implied contract, warranty, implied warranty, misrepresentation, and conduct outside the scope of authority. The

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186. McCormick on Damages, §66 at 246, §67 at 247-48, §68 at 250, 252.

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gravamen of all of those theories is that, when an agent is held liable to a third person in circumstances where he is innocent and his principal directed him to commit the acts upon which recovery is based by the third party, then the principal must reimburse his agent for all amounts expended by the agent in defending the claims of the third party. The court below granted the third-party defendants' motions to dismiss for failure to state a claim,<sup>187/</sup> which of course presupposes that under no conceivable state of facts could those persons who actively implemented and supervised the University's investment program be held liable to the broker-dealers.

The broker-dealers wish to point out once again that they had no opportunity to conduct any discovery against any of the third-party defendants before the trial court dismissed the third-party actions and counterclaims. Therefore, in ruling on those parties' motions to dismiss the broker-dealers' claims for contribution and indemnity, the court was obliged to regard as true all allegations in the broker-dealers' pleading.<sup>188/</sup> The facts pled by the broker-dealers in those actions were:

1. The third-party defendants directed and authorized the University's investments in the subject securities.
2. In connection with those investments, the third-party defendants represented in writing by formal corporate resolution to the broker-dealers that the University had capacity to purchase stock, that Catron had authority to order securities for the University, and

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187. The order granting those motions is discussed supra n. 95 and in accompanying text.

188. E.g., Walker Process Equip. v. Food Mach. & Chem. Corp., 382 U.S. 172 (1965) (interpreting the identical federal rule 12).

that the resolution would remain in full force and effect until revoked in writing.

3. The broker-dealers believed that the University had capacity to purchase securities and they did not receive notice that the University lacked such power or that Catron's authority had been revoked until after all of the subject securities transactions had been completed.

4. The broker-dealers acted as intermediaries or agents in nearly all these transactions and were not sellers of the securities at issue.

5. The third-party defendants were negligent or grossly negligent in failing to determine that these securities purchases might be ultra vires, while the broker-dealers were purely innocent agents. In the alternative, if the broker-dealers are charged with constructive knowledge that these purchases were ultra vires, then the third-party defendants are also so charged.

6. The third-party defendants exceeded their statutory authority in approving these investments.

If the foregoing facts are deemed to be true, the trial court's dismissal of the third-party actions and counterclaims should be reversed.

#### I.

THE BROKER-DEALERS' CLAIMS FOR INDEMNITY AND CONTRIBUTION STATED A CAUSE OF ACTION, AND THE TRIAL COURT ERRED IN DISMISSING THOSE CLAIMS.

The third-party actions instituted by the broker-dealers against Institutional Council members and University officers were predicated,

not on the stock transactions themselves upon which the University herein seeks recovery, but instead on the express warranties of capacity and authority which were directed to each of them by the Council. Accordingly, the broker-dealers' third-party actions do not suffer from the legal defects in the University's complaints: the broker-dealers do not seek recovery on ultra vires contracts, but instead on express misrepresentations and warranties. Under well-settled principles of law, those express warranties of capacity and authority give rise to an implied contract to indemnify the broker-dealers from any losses they may suffer as a result of their reasonable reliance on those warranties.

If the broker-dealers are even constructively at fault in these cases (i.e., if they are charged with constructive notice of the illegality of these investments despite the foregoing arguments that they cannot be so charged),<sup>189/</sup> then they are entitled to full indemnity for all losses they ultimately sustain as a result of reliance on representations by the Council. On the other hand, if the court below were to determine, following trial, that the broker-dealers were equally culpable with the Council members and University officers, then at least their claims for some contribution from those individuals state a cause of action under the general principles applicable to joint wrongdoers.<sup>190/</sup>

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189. See nn. 120 through 125 supra and accompanying text.

190. Joint wrongdoers are liable for contribution in any case where they are both culpable. E.g., 18 Am. Jur. 2d Contributions §§1, 8.

Contribution was allowed by this court in numerous cases where the wrongful act of the defendant seeking contribution was not intentional or negligent. In Culmer v. Wilson, 13 Utah 129, 44 P. 833 (1896), the Court held that anyone who has committed a tort which is one "arising from construction or inference of law, and not arising from unknown or meditated wrong . . . may then have contribution." Id. at 141, 44 P. at 836.

A. The Broker-Dealers' Indemnity Claims Stated A Cause of Action.

Turning first to the broker-dealers' claims for indemnity, the assurances of the Council to the broker-dealers constitute express warranties of capacity and authority for which they are strictly liable to the broker-dealers if those warranties prove false. This is so because the whole purpose of warranty is to relieve the one so assured of his duty to inquire into the facts for himself.<sup>191/</sup>

Even should the broker-dealers be liable to the University and charged with constructive notice of the limits of its capacity and authority despite their diligent inquiries into those issues, and despite the Council's warranties to them,<sup>192/</sup> the law is replete with statements that one only constructively liable may recover indemnity from another party who is actually or primarily at fault. For example, one author states that "In the area of non-contractual indemnity the right rests upon the fault of another which has been imputed or

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And in Hoggan v. Cahoon, 26 Utah 444, 73 P. 512 (1903), the Court found that the actions of the plaintiff seeking contribution had been innocent in purpose, and therefore the cause of action had been properly stated. There plaintiff acted in good faith on the representation of defendant that he could take possession of certain chattels upon which defendant had a chattel mortgage. In taking possession he was not aware that his actions constituted the tort of conversion. The court reiterated the principle that, where the person held liable was acting in good faith and without knowing that he was infringing on the legal rights of third persons, he is entitled to contribution. Id. at 449, 73 P. at 514.

191. E.g., Metropolitan Coal Co. v. Howard, 155 F.2d 780, 784 (2d Cir. 1946) (warranty is assurance of material fact upon which promisee is entitled to rely, is intended to relieve promisee of duty of inquiry, and amounts to promise to indemnify promisee for any loss if warranty is proved untrue.)

192. That the brokers should be relieved of the burden of constructive notice in these cases is explained at length, supra at nn. 120-125.

constructively fastened upon him who seeks indemnity."<sup>193/</sup> To the same effect is the statement that a person

is entitled to recover indemnity where, as between the parties to the indemnity action, the defendant is primarily liable while the plaintiff is only secondarily liable -- that is, when the plaintiff is only technically or constructively liable to the injured party, or where his liability was based on a legal or contractual relationship with the defendant. <sup>194/</sup>

Numerous holdings reaffirm the principle that a master held liable because of respondeat superior (another legal fiction, analogous to constructive notice) may recover indemnity from the servant who actually caused an injury, which is simply the other side of the coin from the basis for indemnity asserted by the brokers here.<sup>195/</sup>

B. The Broker-Dealers' Indemnity Claims Based on Warranty Stated A Cause of Action.

A warranty is any assurance by one party of the existence of a material fact upon which a second party may rely. Its express purpose is to relieve the second party of his duty to inquire further into the facts for himself. A party who relies on an express warranty is entitled to be indemnified for any loss he sustains because of the

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193. 41 Am. Jur. 2d, Indemnity, §19 (emphasis added).

194. Id., §20 at 707-08 (emphasis added, citations omitted). Accord: Leflar, Contribution and Indemnity Between Tortfeasors, 81 U. Pa. L. Rev. 130, 146 (1932). Leflar points out that the right of indemnity may arise through contract, quasi-contract, or tort, and notes that "the obligation to indemnify is not a consensual one; it is based altogether upon the law's notion - influenced by an equitable background -- of what is fair and proper between the parties."

195. E.g., Holmstead v. Abbott GM Diesel, Inc., 27 Utah 2d 109, 112, 493 P.2d 625 (1972).

warranty's falsity.<sup>196/</sup>

In these cases of course the broker-dealers cannot be held liable to the University at all if they are relieved of constructive notice, as that is the sole basis for the University's theory of recovery. Furthermore, these express warranties to the broker-dealers should not only relieve them of any such constructive notice and should therefore result in judgment in their favor on the University's complaint, those warranties should for the same reason entitle them to recover on these third-party actions.

C. The Broker-Dealers' Claims For Contribution Stated A Cause of Action.

The principles applicable to a claim for indemnity where one is only constructively liable apply with equal force to a claim for contribution. A series of Utah cases has held that one only constructively liable to an injured party may recover either contribution or indemnity from the person primarily responsible.<sup>197/</sup>

D. The Court Below Erred in Shifting All Liability On These Transactions to the Broker-Dealers.

The court granted all the third-party defendants' motions to dismiss without setting forth any reasons for those dismissals in

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196. E.g., Paccon, Inc. v. United States, 399 F.2d 162 (Ct. Cl. 1968). See Quagliana v. Exquisite Home Builders, Inc., 538 P.2d 301 (Utah 1975).

197. Cases cited supra, n. 190. And see Holmstead v. Abbott GM Diesel, Inc., 27 Utah 2d 109, 112, 493 P.2d 625 (1972) ("While a master may be jointly sued with the servant for a tort of the latter, . . . they are not joint tort-feasors in the sense that they are equal wrongdoers without right of contribution, for the master may recover from the servant the amount of loss caused him by the tort. . . .").

its memorandum decision.<sup>198/</sup> The only clues provided by the court at later dates as to its reasons for dismissing the counterclaims and third-party actions were two statements it made in the course of other rulings. At oral arguments on April 19, 1978, the court explained that its decision to grant the third-party motions filed by the officers and Council members was based "primarily on immunity."<sup>199/</sup> And the court also noted, in its final decision granting the University's motions for partial summary judgment, that:<sup>200/</sup>

This court feels that the brokers cannot escape liability for their illegal acts, acts with which they are charged legally with knowing to be illegal by saying officials of Utah State also knew this and were charged with this knowledge. The Court feels that where a governmental entity is involved and the parties are charged with the legal use of public funds that the other illegal party cannot escape liability by saying the specific party he dealt with does not come into this matter with clean hands either.

In other words, if one "illegal party" is a government entity or official, and the other "illegal party" is a private party, the trial court believes that only the private party may be held responsible for losses occasioned by the conduct of the government or its official. Also clear in the court's statement is its belief that ordinary defenses to an equitable action for restitution are not available to defendants when they are sued by the government. The broker-dealers respectfully submit that this principle of law is untenable, grossly unfair, and completely without legal foundation. Accordingly, the third-party actions should be re-instituted.

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198. R. 1775 (Bear Stearns).

199. April 19, 1978 Tr. at 68 (Vol. 237).

200. October 27, 1978 memorandum decision, R. 2186.



II.

THE TRIAL COURT ERRED IN DISMISSING THE THIRD PARTY  
ACTIONS TO THE EXTENT THAT THOSE DISMISSALS  
WERE BASED ON GOVERNMENTAL IMMUNITY.

As just noted,<sup>201/</sup> the court stated during the course of oral arguments on April 19, 1978, that its "primary" ground for dismissing the third-party complaints was that of immunity. The court erred in holding that the Council members and officers were immune in these third-party proceedings, for a variety of reasons.

The Council members and officers did not claim immunity under the Governmental Immunity Act, since that Act applies only to "governmental entities" and does not apply to employees of "governmental entities."<sup>202/</sup> Instead, they merely argued that they were entitled to a common law "official immunity" for their conduct of official, discretionary duties.<sup>203/</sup> The third-party defendants' recognition that they could not invoke the protection of the Utah Governmental Immunity Act was quite correct,<sup>204/</sup> but their assertion of common law immunity was not well taken, and the trial court erred in ruling in their favor on that basis.

A. Officials May Not Invoke Immunity If They Exceed Their Authority.

A decision issued by this Court during the course of the proceed-

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201. See text at supra n. 199.

202. E.g., Nov. 21, 1977 Tr. at 87-88 (Vol. 38) (remarks of Mr. Campbell).

203. Id.

204. E.g., Cornwall v. Larsen, 571 P.2d 925, 927 (Utah 1977) ("The Utah Government Immunity Act applies only to entities and does not include individual [employees] . . .").

ings in these cases, and argued to the court below at oral arguments on the third-party defendants' motions to dismiss,<sup>205/</sup> clearly demonstrates the trial court's error in dismissing the claims against the officers and Council members. In Cornwall v. Larsen,<sup>206/</sup> a minor was injured in a collision between the automobile in which he was riding and a vehicle operated by a deputy sheriff. He brought suit against the county, the deputy sheriff and the sheriff. The trial court dismissed the suit as to all defendants, but this Court reversed the dismissal as against the sheriff and other named individuals, and remanded the case for trial.<sup>207/</sup> The Court ruled that the allegations of the complaint stated a cause of action because they alleged that the acts of the officer driving the emergency vehicle were willful, unlawful, and in excess of his authority.<sup>208/</sup> In an earlier decision, this Court ruled that an officer engaged in the exercise of a governmental function was not protected from liability if he was acting in bad faith or outside the scope of his authority.<sup>209/</sup>

The allegations of the complaints filed by the broker-dealers clearly meet the requirements for stating a cause of action against individual government officers as set forth in Cornwall and earlier

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205. Arguments of Mr. Christensen on behalf of Bosworth Sullivan, Nov. 21, 1977 tr. at 62-64 (Vol. 38).

206. 571 P.2d 925 (Utah 1977).

207. Id. at 928.

208. Id. at 927.

209. Sheffield v. Turner, 21 Utah 2d 314, 316-17, 445 P.2d 367 (1968).

Utah cases.<sup>210/</sup> The broker-dealers have alleged that the conduct of the officers exceeded the scope of their authority, allege that those officers were negligent in not ascertaining that the securities transactions in question might be ultra vires, and allege that the officers knew or should have known these facts. The brokers also state a cause of action against the officers and members for failing to notify them earlier of their revocation of Catron's authority, a purely ministerial act which would also give rise to liability.<sup>211/</sup>

Whenever a public officer exceeds his authority or jurisdiction in carrying out either ministerial or discretionary duties in this state, he will be held personally liable to the private party injured by his actions, if his actions are in excess of his statutory authority.<sup>212/</sup> It is clear that the third-party complaints stated claims against the members and officers for acts outside their statutory authority.

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210. Any time an officer acts outside the scope of his authority, he will be liable to anyone he injures. Logan City v. Allen, 86 Utah 375, 381, 44 P.2d 1085 (1935) (officers performing discretionary acts "may become civilly liable where they act in excess of authority"); Blomquist v. Summit County, 25 Utah 2d 387, 483 P.2d 430 (1971) (if county officials were mistaken with respect to jurisdictional facts upon which they acted, then they would be personally liable to plaintiffs); Roe v. Lundstrom, 89 Utah 520, 527, 57 P.2d 1128 (1936) (no public officer may claim immunity for the commission of an act entirely outside the scope of his official duties.").

211. It is undisputed by the third-party defendants that public employees are liable for the misperformance of ministerial acts.

212. Cases cited supra n. 210.

This is best represented by a simple syllogism: (1) if the University is entitled to recover in its principal action against the broker-dealers, it will do so on the sole basis that the securities transactions at issue were ultra vires, i.e., not authorized by statute; (2) if the University lacks statutory capacity to engage in the subject transactions, then the members and officers similarly lacked statutory authority to order the securities at issue or to issue the resolutions and ratifications of those transactions upon which the broker-dealers relied in taking the University's orders; (3) accordingly, the acts of the officers and members are not protected by common law official immunity, because they clearly exceeded their statutory authority as alleged in the complaints.

### PART THREE

THE COURT ERRED IN DENYING MERRILL LYNCH'S MOTION  
FOR CHANGE OF VENUE AND THE OTHER BROKER-DEALERS'  
MOTIONS TO DISMISS FOR LACK OF IN PERSONAM  
JURISDICTION

#### I.

MERRILL LYNCH'S MOTION FOR CHANGE OF VENUE  
TO THE THIRD DISTRICT SHOULD HAVE BEEN GRANTED

There is no dispute that the venue of this action is governed by Utah Code Ann. §78-13-7 (1953), which requires that an action be tried in the county where either (1) the action arises or (2) the defendant resides. The University did not challenge the fact that Merrill Lynch resides in Salt Lake County for venue purposes. Since defendant's residence is not at issue, the question here turns on whether the cause of action arose in Salt Lake County or in Cache County.

The lower court erroneously held that the cause of action arose in Cache County. In its memorandum decision, the court erroneously found that the University's Cache County bank was "designated" by Merrill Lynch to be its agent to accept securities on the University's behalf and to pay Merrill Lynch. The court erroneously reasoned that the "wrong" was the payment for the securities by the University in Logan and because payment was made by a Cache County bank acting as "agent" for Merrill Lynch, the cause of action arose there.

The uncontroverted facts are that the University opened and maintained an account with Merrill Lynch at its Salt Lake City office, that Merrill Lynch has not had an office or representative in Cache County, Utah, that it received and forwarded all orders from the

University for the purchase and sale of securities at its Salt Lake office, that Catron placed approximately half of the University's orders while he was in Merrill Lynch's office in Salt Lake City, that the University, not Merrill Lynch, designated its bank in Logan, Utah to accept securities ordered by the University and to pay Merrill Lynch for the same, that Merrill Lynch never maintained an account with the University's bank in Cache County, that Merrill Lynch had no control over the University's bank, and that because the University's bank was continually late in making payment for securities delivered, Merrill Lynch ceased doing business with the University.<sup>213/</sup>

A. The Cause of Action Arose in Salt Lake County.

1. The Cause of Action Arises Where the Defendant's Wrongful Act Occurs. Any Wrongful Acts Allegedly Committed By Merrill Lynch Must Have Occurred in Salt Lake County.

The cause of action occurs where the wrong occurs.<sup>214/</sup> If "the two essential factors of the cause of action, namely, the right of the plaintiff and the act or omission on the part of the defendant, occur in different counties, the cause of action accrues in the county in which defendant's wrongful act was done."<sup>215/</sup>

What the University actually bases its venue claims on are its own contacts with a bank in Cache County, not those of Merrill Lynch.

213. Memorandum and Reply Memorandum in Support of Motion for Change of Venue and accompanying Affidavits. R. 21, 28, 30, 31, 85, 95, 97 (Merrill Lynch).

214. Bach v. Brown, 17 Utah 435, 439, 53 P. 991 (1898) ("the cause of action . . . is the wrong").

215. 92 C.J.S. Venue, §80 at 776-77 and n. 96, citing several authorities. Accord: State v. Lake Tavery, 252 P.2d 831 (Idaho 1953); Bergin v. Temple, 111 P.2d 286 (Mont. 1941).

The plaintiff's own contacts with the forum are, however, irrelevant for purposes of a motion for change of venue. In an analogous case, American Body & Trailer Co. v. Higgins,<sup>216/</sup> a plaintiff brought an action against a corporation for breach of contract for sale of goods. In determining where the cause of action "arose," the court found that, where the plaintiff contracted to purchase goods in one county, and the corporation assented to the contract in another county, venue was proper only in the second county.

In the instant case, Merrill Lynch assented to the transactions in question from its place of business in Salt Lake County, and all other actions taken by it in this state on the University's behalf occurred there. Venue is proper only in Salt Lake County because that is only where the wrong alleged against Merrill Lynch could have taken place.

2. The Logan Bank Was Not an Agent of Merrill Lynch.

The court below found that Merrill Lynch "designated"<sup>217/</sup> the bank in Logan to receive the securities on the University's behalf, although the University had not disputed Merrill Lynch's assertion that the University, not Merrill Lynch, had chosen that bank. The court therefore concluded that the cause of action arose in Cache County. The University argued below that the acceptance of the University's money is the "wrong" upon which the complaint is based, not Merrill Lynch's acceptance and execution of the University's orders, and the wrong occurred in Logan because the bank there was Merrill Lynch's agent.

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216. 156 P.2d 1005 (Okla. 1945).

217. R. 151 (Bosworth Sullivan file). The Merrill Lynch file does not contain a copy of that decision; it notes that this memorandum decision is contained only in the Bosworth file. R. 128 (Merrill Lynch file).



This position is based on the tenuous argument that the Utah Uniform Commercial Code, Utah Code Ann. §70A-4-201(1), not intended to resolve venue questions, may be so construed as to make the Logan bank the agent of Merrill Lynch. The University argued that because Merrill Lynch accompanied the securities sent to the Logan bank with a sight draft to draw on the University's account for payment and because the bank was a "collecting bank" and not a "payor bank" within the meaning of Article 4 of the Uniform Commercial Code, it was Merrill Lynch's agent. Although these provisions of the Uniform Commercial Code are inapplicable to questions of venue, it is clear that the Logan bank was a "payor bank", not a "collecting bank" and thus not the agent of Merrill Lynch. This is made clear by the applicable provisions of the Code.

Utah Code Ann. §70A-4-105(b) states that a "payor bank" is a "bank by which an item [here, a sight draft] is payable as drawn or accepted." Official Comment (2) to the Uniform Commercial Code, as adopted by the American Law Institute, states that:

The term "payor bank" includes . . . a bank at which an item is payable if the item constitutes an order of the bank to pay, for it is then "payable by" the bank.

Section 70A-4-105(d) provides:

"Collecting bank" means any bank handling the item for collection except the payor bank.

Clearly the Logan bank was the payor bank on the item. Because the Logan bank was the payor bank, it was not Merrill Lynch's agent under §70A-4-201(1). The action did not arise in Cache County. It arose in Salt Lake County, and the court below erred in denying Merrill Lynch's motion for change of venue.

3. A Defendant's Right to be Sued in the County of His Residence is Not Lightly to be Denied.

The privilege conferred on a defendant of being sued in the county of his domicile is a valuable and substantial right, which is not to be denied except in strict compliance with the law, as where the case against defendant clearly comes within one of the statutory exceptions to his right to be sued in the county where he resides.<sup>218/</sup>

Statutes permitting suit in some place other than the defendant's domicile are in derogation of this common law right and must be construed strictly.<sup>219/</sup> But even if it is assumed arguendo that some facet of the cause of action here arose in Cache County, venue is still properly laid in Salt Lake County.

[I]t has been said that it would lead to confusion and the practice of "forum shopping" if the law were to permit a suit to be commenced against a corporation in any county where any facet of a complex transaction occurred.<sup>220/</sup>

Merrill Lynch is entitled to defend this action in the county where it resides. The court below erred in denying its motion for change of venue.

II.

THE TRIAL COURT ERRONEOUSLY DENIED THE MOTIONS OF  
BEAR STEARNS, HORNBLOWER AND SUTRO TO DISMISS  
FOR LACK OF IN PERSONAM JURISDICTION.

The lower court erroneously held Bear Stearns, Hornblower and Sutro were subject to in personam jurisdiction in this state even though the University opened accounts with them in California, sent its agent there to meet personally with them on several occasions

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218. 92 C.J.S. Venue, §82 at 780-81 (citations omitted, emphasis added).

219. Id., §82 at 781 (and authorities cited therein).

220. 77 Am. Jur. 2d Venue, §38 at 884 (citations omitted).

and even though no employee or agent of these broker-dealers ever met with any representative of the University in this state.<sup>221/</sup> The court so held because (1) these broker-dealers advertised in periodicals published outside of Utah but with national circulation and (2) they mailed securities, confirmation slips, and monthly statements to the University in Logan.<sup>222/</sup> Decisions of the Utah Supreme Court interpreting Utah's long-arm statute demonstrate that Utah does not have personal jurisdiction over these defendants.

In 1969 the Utah legislature adopted §78-27-24, Utah Code Ann., Utah's long-arm statute. Pursuant to this statute, a person submits himself to the jurisdiction of this state

As to any claim arising from:

- (1) the transaction of any business within this state;
- (2) contracting to supply services or goods in this state;
- (3) the causing of any injury within this state, whether tortious or by breach of warranty.

While the long-arm statute also sets forth other bases for jurisdiction, the University has alleged jurisdiction over these defendants pursuant to the foregoing provisions only.<sup>223/</sup>

A. The Defendants Are Not Subject to In Personam Jurisdiction in the State of Utah Because They Have Not Engaged in Substantial Activities Within the State.

221. Memoranda and accompanying Affidavits supporting motions to dismiss for lack of personal jurisdiction. R. 45, 57, 59, 61 (Bear Stearns); R. 23, 36, 38, 40, 42, 44 (Sutro); R. 23, 36, 38 (Hornblower).

222. Memorandum Decision filed Jan. 18, 1977 at 2. R. 293 (Bear Stearns).

223. University memoranda opposing motions to dismiss for lack of personal jurisdiction. R. 129, 265 (Bear Stearns).

In Producers Livestock Loan Co. v. Miller,<sup>224/</sup> this Court held that the activities performed by a Utah resident on behalf of the nonresident defendants constituted substantial activities within the state. Therefore, the defendants were subject to the jurisdiction of Utah courts under the long-arm statute. In his opinion holding that jurisdiction existed, Justice Crockett acknowledged that there are necessary and desirable limitations to the extension of jurisdiction over nonresident defendants:<sup>225/</sup>

[I]n order to assert jurisdiction over a party, it must appear that he engaged in some substantial activities within the state beyond . . . merely transitory matters . . . , so that it is reasonable and just to assume that he has had the benefit of the protections and advantages of the laws and institutions of the state to the extent that it is within the concept of fairness and due process that he be subjected to the jurisdiction of its court.

In Producers Livestock, the nonresident defendants operated a livestock operation outside Utah and hired a Utah resident to act as manager. At all times the livestock was expressly designated as belonging to the nonresident defendants. The resident carried on the business in Utah for the defendants , had an office here, and obtained a loan here to finance the livestock operation. The Court found that the resident was an agent of the nonresident defendants. Therefore, insofar as the Utah resident was doing acts within the scope of his authority in Utah, the defendants were deemed to be performing those acts themselves.<sup>226/</sup>

In contrast, the defendants in this case had no person or agent transacting any business in Utah for them. Moreover, the activities

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224. 580 P.2d 603 (Utah 1978).

225. Id. at 605.

226. Id. at 606.

conducted by the defendants in Utah are much less substantial than those engaged in by the New York defendants through their representative in Producers Livestock. The broker-dealers' activities (mailing documents) in Utah were merely incidental to the securities transactions which took place in California. The University voluntarily decided to conduct its stock purchasing business in California rather than in Utah. It opened and maintained accounts with defendants at their respective offices in California. The University's investment officer placed orders for securities purchases which were accepted by defendants in California and executed on the University's behalf on national exchanges outside of Utah. Payment for these securities occurred outside of Utah.

The activities of these broker-dealers found to be significant by the court below are comparable to some of the transitory matters acknowledged by Justice Crockett in Producers Livestock to be outside the jurisdictional powers of Utah courts: 227/

- (1) Where a person buys stock in a corporation, such as U.S. Steel or General Motors, where the enterprise is located in and carried on in another state; or
- (2) Where a manufacturer advertises and distributes his product for sale through independent dealers or retailers in other states.

In such instances, it is very likely there will be incidental activities involving the exchange of money from a bank in one forum to another, or various mailings between the parties such as the confirmation slips and account statements in this case. These insignificant activities incidental to such matters would not serve to bring

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227. Id. at 605.

the transaction within the jurisdictional power of this state. The University's actions against these defendants should be dismissed for lack of in personam jurisdiction.

B. The Defendants Have Not Transacted Business in Utah.

This Court set forth in Hill v. Zale Corp.,<sup>228/</sup> - a decision cited favorably in Producers Livestock -- a number of factors to be considered collectively to determine if a corporate defendant was "doing business" and thus established the minimum contacts necessary to support an assertion of personal jurisdiction:

- (1) Whether there are local offices, stores or outlets;
- (2) The presence of personnel, how hired, fired and paid;
- (3) The manner of holding out to the public by way of advertising, telephone listing, catalogues, etc.;
- (4) The presence of its property, real and personal, or interest therein, including inventories, bank accounts, etc.;
- (5) Whether the activities are sporadic or transitory as compared to continuous and systematic;
- (6) The extent to which the alleged facts of the asserted claim arose from activities within the State;
- (7) The relative hardship or convenience to the parties in being required to litigate the controversy in the State or elsewhere.

Under these considerations, and after analysis of the facts in the cases decided by this Court, it is clear that these defendants were not doing business in the State of Utah.

In Union Ski Co. v. Union Plastics Corp.,<sup>229/</sup> -- a case which more closely resembles the factual setting of this case -- the Court

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228. 25 Utah 2d 357, 482 P.2d 332 (1971).

229. 548 P.2d 1257 (Utah 1976).

held that Utah courts did not have in personam jurisdiction over a California company that had contacts in Utah much more substantial than those of the defendants here. The defendant company in that case had no office or store in the state, no property, inventory, telephone listing or bank account, and did no advertising in Utah. In addition, the contract at issue was executed in California, payments were made to the defendant's bank in California, and the ski boots were to be manufactured there. The contacts which the defendant did have with Utah did not amount to conduct or activity beyond a mere casual or transitory presence.<sup>230/</sup>

In Foreign Study League v. Holland-American Line,<sup>231/</sup> the Court upheld the jurisdiction of the Utah courts, but only after observing that defendant's representatives had on several occasions traveled to the State of Utah to conduct business with the President of the plaintiff corporation. Also, the defendant corporation had authorized numerous agents within the state to display defendant's literature, to "sell bookings" for defendant's ships, and to accept commissions for accepted bookings. Finally, defendant entered into agreements exercising substantial control over the activities of its agents here. Again, in contrast, the defendants in this case have not traveled to Utah to conduct business and have never maintained any agents or employees in the State.

C. The Defendants' Activities in This State Do Not Constitute The Minimum Contacts Sufficient to Permit Assertion of Jurisdiction by Utah Over These Defendants.

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230. Id. at 1259.

231. 27 Utah 2d 442, 497 P.2d 244 (1972).



As stated by the United States Supreme Court:<sup>232/</sup>

Due process requires only that in order to subject the defendant to a judgment in personam, if he be not present within the territory of the forum, he has certain minimum contacts with it such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice."

It is apparent that the activities of defendants do not rise to a level which would satisfy the due process clause. All of the business transactions that took place between these parties took place in California or by telephonic communications. Defendants have never maintained offices, telephones, telephone listings, office equipment, employees, agents, books, bank accounts, records or the like, or advertised in Utah.

The defendants' advertising in national publications does not constitute contacts which rise to the level of fair play. The Utah legislature has recognized that it would be unfair and unreasonable to require foreign broker-dealers to register in Utah simply because they advertise in national publications which are read in Utah. See Utah Blue Sky Law, Utah Code Ann. §61-1-26(4). Similarly, the confirmation slips and account statements mailed by the defendants to the University are merely contacts incidental to a transaction that occurred in California. These documents served only to provide a record after the fact of the activity authorized by the University in its accounts in California -- they were not the activity. The stock certificates sent to Utah were of a nature similar to that of the confirmation slips and account statements; thus that contact does not rise to a level which satisfies the due process clause.

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232. International Shoe v. Washington, 326 U.S. 310 (1945).

Finally, it would offend traditional notions of fair play to assert jurisdiction over the defendants on the basis of the telephone calls received by them from the University. This Court has expressly held that numerous telephone calls into the State, occurring over a fifteen year period, will not sustain personal jurisdiction over a nonresident defendant. In Cate Rental Co., Inc. v. Whalen & Co.,<sup>233/</sup> jurisdiction was lacking even though "defendant called plaintiff by telephone . . . on the average of five times a year for the past ten years," in order to arrange for leasing plaintiff's equipment. Moreover, it must be remembered that those telephone calls were made to effectuate business in California, and not in Utah as has already been explained.

In summary, these three defendants were not properly subjected to personal jurisdiction under the Utah long-arm statute, and the University's complaints against them should be dismissed.

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233. 549 P.2d 707 (Utah 1976).

## CONCLUSION

No party to any of these actions has alleged or could allege that these defendant broker-dealers did anything during the period from September 1970 through March 1973 other than to scrupulously, fairly, and diligently carry out instructions given to them by the governing body of the University. That same group of officials initiated and defined the governing policies of the University's investment program, approved every purchase and sale at issue here, had actual knowledge of the transactions executed for the University, and affixed the University's corporate seal to their representations of capacity and authority to each broker-dealer. Now the University seeks to recover all the funds which those individuals allegedly misspent, from defendants who were not even parties to the underlying transactions.

Allowing recovery to the University under those circumstances and denying the broker-dealers their right to indemnity and contribution would be not merely incomprehensible but would also defy due process of the law and would serve no legitimate public policy. The broker-dealers cannot state the equities underlying their position with respect to both the University's complaint and the third party actions more succinctly than this Court has itself explained them:<sup>234/</sup>

In determining legal rights on the basis of fairness and justice, the idea of sovereign immunity is perplexing. It has the effect of clothing one party to the controversy with an advantage which is in most instances unfair and unwarranted.

. . .

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234. Driggs v. Utah State Teachers Retirement Bd., 105 Utah 417, 425-26, 142 P.2d 657, 660-61 (1943). The court in that case estopped the Board from reducing pension payments to a retired school teacher under a new statute which would no longer authorize those payments. Instead, the court ruled, the State must continue to pay a higher amount than that allowed by statute to the plaintiff, even though such payments would be ultra vires and prospective (rather than purely retrospective, as is the case with the amounts involved herein).

The State is merely a collection of individuals, and there seems to be no logical reason why the collective entity should not be bound by the same concepts of justice and morality as its individual members, at least with respect to contractual obligations.

Accordingly, the broker-dealers respectfully request the following relief from this Court:

1. Reversal of the partial summary judgment orders entered in favor of the University, with directions to the trial court to reverse its rulings denying the broker-dealers' second motions to dismiss for failure to state a claim and to enter judgment in favor of all broker-dealers on those motions to dismiss.


2. Reversal of the final judgments entered in favor of the third-party defendants and the University on the third-party complaints and counterclaims. This relief should be granted regardless of how the Court rules on the partial summary judgment question.

3. If the Court does not grant the broker-dealers the relief requested in paragraph 1 above, then they respectfully request that it reverse the trial court's rulings on personal jurisdiction and venue. If it does so, then the complaints against Sutro, Bear Stearns and Hornblower should be dismissed for lack of in personam jurisdiction and the Merrill Lynch action should be transferred to the Third District Court.

Respectfully submitted this 11th day of June, 1979.

PARSONS, BEHLE & LATIMER

By

  
Daniel M. Allred

  
Kathlene W. Lowe

Attorneys for Defendants

## APPENDIX A

### BUSINESS SOPHISTICATION OF UNIVERSITY OFFICERS AND INSTITUTIONAL COUNCIL MEMBERS

A brief description of the business experience and sophistication of Institutional Council members and University officers demonstrates that considerable business acumen was brought to the investment program.

1) Councilman Plowman was, during the period in question, President and Chairman of the Board of Lewiston State Bank in Cache County. He handled the municipal and governmental bond portfolio for the bank. For liquidity reasons, he invested in high grade municipals and government issues.<sup>1/</sup> As an Institutional Council member, he was a charter member of the University's investment committee and as such he attended the Ford Foundation seminar in San Francisco in January 1971.<sup>2/</sup>

2) Councilman Bullen received his MBA from Harvard University, is a successful businessman, and has purchased securities, including common stocks for his own account, for the past 25 years.<sup>3/</sup> He also attended the Ford Foundation seminar in January 1971 and was a charter member of the investment committee.<sup>4/</sup>

3) Councilman Hammond was Senior Vice President for First Security Bank from 1950 to 1970 and in that capacity was in charge of

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1. Plowman depo. at 7-9.
  2. Exs. 10, 197.
  3. Bullen depo. at 7-8.
  4. Exs. 10, 17.

its Northern Division, which includes all its banks from Davis County to Idaho. He was familiar with the bank's trust department and the securities purchased by that department, as well as the standards and policies set by the bank regarding such purchases. One such policy was diversification, to spread the risk of loss. Whether to purchase a conservative or speculative security was given great consideration by the bank. He has also purchased securities for his own account. When he graduated from college in 1924, he was employed as a salesman with a brokerage firm, selling stocks and bonds. He understands the traditional considerations used to determine the quality of a security.<sup>5/</sup>

4) Councilman Harris was on the Board of Directors of First Security Bank, is a "good" and "successful" businessman and, in connection with his business, has large borrowings from the three largest banks in Western America.<sup>6/</sup> He also served as chairman of the investment committee as early as April 1972.<sup>7/</sup>

5) Councilman Stockdale is a certified public accountant. From the early 1960's to the present, he has supervised the investment of endowment funds of Brigham Young University in common stocks and bonds. In addition, from 1969 to 1971 he gave advice to clerks in his office in regard to handling common stocks on a regular basis. He has also performed this service for a number of his accounts. He served on the Business Affairs and the Investment Committees of the University.<sup>8/</sup>

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5. Hammond depo. at 7-13.

6. Harris depo. at 31.

7. Ex. 49.

8. Stockdale depo. at 7-17.

6) Councilman Olsen is a successful rancher who has been purchasing stocks in his own account for some 20 years and who understands the nature of a margin account.<sup>9/</sup>

7) Councilman Bingham is a civil engineer who invested in securities in his own account sufficiently to understand what a margin account was.<sup>10/</sup>

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9. Olsen depo. at 10.

10. Bingham depo. at 9.



## CORPORATE RESOLUTION:

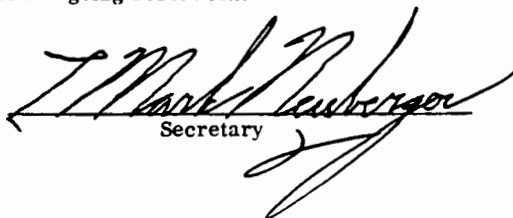
I, L. Mark Neuberger, being duly constituted Secretary to the Institutional Council, Utah State University, a corporation organized and existing under and by the virtue of the laws of the State of Utah (hereinafter called this Corporation) do hereby certify that the following is a true and complete copy of resolutions duly adopted at a meeting of the Board of Directors of this Corporation, duly called and held on January 20, 1972, at which a quorum was present and voting; that said resolutions are still in full force and effect and have not been rescinded; and that said resolutions are not in conflict with the Charter or By-Laws of this Corporation.

BE IT RESOLVED: That this corporation is authorized and empowered to open and maintain an account with any broker who is a member of any of the major security exchanges or the National Association of Security Dealers for the purchase, trade, and sale, long or short, transfer, and assign, stocks, bonds, and securities of every nature on margin or otherwise, and that any of the officers hereinafter named be, and hereby is authorized to give written or verbal instruction to the brokers concerning the herein named transactions; and he shall at all times have authority in every way to bind and obligate this corporation for the carrying out of any contract or transaction which shall, for or on behalf of this corporation, be entered into or made with or through the brokers; and that the brokers are authorized to receive from this corporation, checks and drafts drawn upon the funds of this corporation by any officer or employee of this corporation, and to apply the same to the credit of this corporation or to its account with said brokers: All confirmations, notices, and demands upon this corporation may be delivered by the brokers verbally or in writing, or by telegraph, or by telephone to any such officer and he is authorized to empower any person, or persons, that he deems proper, at any time, or times, to do any and all things that he is hereinbefore authorized to do. That this resolution shall be and remain in full force and effect until written notice of the revocation hereof shall be delivered to the brokers. The officer(s) herein referred to and named as follows, to-wit:

- (1) Dee A. Broadbent, Vice President of Business and Treasurer
- (2) Donald A. Catron, Controller

I, L. Mark Neuberger, Secretary of  
Utah State University Institutional Council  
hereby certify that the foregoing is a full, true and correct copy of a resolution duly  
and regularly passed and adopted by the unanimous vote of the Board of Directors of  
said company at a meeting thereof duly called and held at the office of said company  
on the 20th day of January, 1972, at which meet-  
ing the directors were present and voting, that said resolution appears in the minutes  
of said meeting, and that the same has not been rescinded or modified and is now in  
full force and effect.

I further certify that said corporation is duly organized and existing, and has  
the power to take the action called for by the foregoing resolution.

  
Secretary

SEAL

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing Brief of Appellant was mailed this 11<sup>th</sup> day of June, 1979 to each of the following:

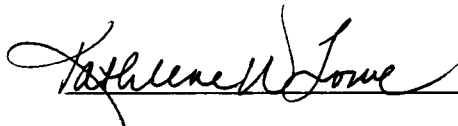
Darwin C. Hansen, 110 West Center Street, Bountiful, Utah 84010, attorney for third-party defendant Donald Catron;

Robert S. Campbell, Jr. and Michael Heyrund, of Watkiss & Campbell, 310 South Main Street, 12th Floor, Salt Lake City, Utah 84101, attorneys for Phillip A. Bullen, Jay R. Bingham, O. C. Hammond, Jay Dee Harris, Beverly D. Kumpfer, Snell Olsen, Rex G. Plowman, W. B. Robins, Alva C. Snow, William R. Stockdale, Jane S. Tibbals, Glen L. Taggart, Dee A. Broadbent, L. Mark Neuberger, defendants and third-party plaintiffs;

David L. Wilkinson, Co. Attorney's Office, Room C-220, Metropolitan Hall of Justice, Salt Lake City, Utah, attorney for Utah State University of Agriculture and Applied Science;

Lyle W. Hillyard, 175 East 100 North, Logan, Utah 84321;

David R. Melton, Esq., of Karon, Morrison & Savikas, Ltd., 5720 Sears Tower, 233 So. Wacker Drive, Chicago, Illinois 60606.

  
Katherine L. Lowe